LEXSEE

BERNIE TRUMM and LEROY TRUMM, Plaintiffs-Appellees/Cross-Appellants, vs. FEEDER'S SUPPLY, INC., a corporation, Defendant-Appellant/Cross-Appellee.

No. 2-672 / 01-1859

COURT OF APPEALS OF IOWA

2002 Iowa App. LEXIS 1278; 49 U.C.C. Rep. Serv. 2d (Callaghan) 44

November 25, 2002, Filed

NOTICE:

NO DECISION HAS BEEN MADE ON PUBLICATION OF THIS OPINION. THE OPINION IS SUBJECT TO MODIFICATION OR CORRECTION BY THE COURT AND IS NOT FINAL UNIL THE TIME FOR REHEARING OR FURTHER REVIEW HAS PASSED. AN UNPUBLISHED OPINION MAY BE CITED IN A BRIEF; HOWEVER, UNPUBLISHED OPINIONS SHALL NOT CONSTITUTE CONTROLLING LEGAL AUTHORITY.

PRIOR HISTORY: Appeal from the Iowa District Court for Jackson County, Nancy S. Tabor, Judge. Feeder's Supply, Inc. appeals from the district court's order ruling it breached its contract with Bernie and Leroy Trumm, who cross-appeal.

DISPOSITION: AFFIRMED.

COUNSEL: Steven Kahler of Schoenthaler, Robert, Bartelt & Kahler, Maquoketa, for appellant.

Joseph Bitter of Bitter Law Offices, Dubuque, for appellee.

JUDGES: Heard by Huitink, P.J., and Zimmer and Eisenhauer, JJ.

OPINION BY: EISENHAUER

OPINION

EISENHAUER, J.

Feeder's Supply, Inc. (FSI) appeals from the district court's order ruling it breached its contract with Bernie and Leroy Trumm and awarding the Trumm's $ 60,809.00 in damages. FSI contends the district court erred in dismissing its counterclaim for lack of evidence, and in awarding damages to the Trumms. The Trumms cross-appeal, contending they are entitled to additional damages. We affirm.

[*2] ***I. Background Facts and Proceedings.*** In April 1996, the Trumms entered into a contract with FSI for the sale of segregated early weaned (SEW) pigs. The two-year contract required FSI to buy 900 SEW pigs per month from the Trumms at a purchase price of between $ 27 and $ 39 per head. The contract specified the breeding stock used by the Trumms would consist of F-1 Geniti-Porc gilts and Seghers Terminal boars, and the Trumms were to use only Master Mix feed. Under the contract, FSI was required to notify the Trumms of any complaints concerning the quality or quantity of SEW pigs within twenty-four hours of delivery.

Jeff Paulsen was in charge of FSI's hog contracting from 1993 until June 1998. Paulsen visited the Trumms' farm once or twice a week. During the term of the first contract, no complaints were relayed to the Trumms' regarding the quality of the pigs.

During the summer and fall of 1997, the parties began negotiating the terms of a second two-year contract, which was signed in November 1997. The second contract, effective March 1, 1998, was identical to the first, except the sale price of the SEW pigs was renegotiated to between $ 30 and $ 42 per head.

In March [*3] of 1998, FSI began complaining to the Trumms about the quality of the pigs, claiming that when they were marketed six months later, they were not cutting out at fifty one percent lean. Because the market had changed, FSI was having difficulty selling the hogs and prices were declining. FSI stopped buying the SEW pigs at twenty-one days as specified in the contract. The Trumms had to keep the pigs longer than twenty-one days, feeding and housing them until FSI could take delivery.

In July 1998, Paulsen began working for Cargill, a company that supplies feed to FSI. The Trumms assumed Paulsen was still an agent for FSI. Paulsen requested that the Trumms switch to Cargill feed. The Trumms tried one delivery of feed, but were not satisfied and returned to using Master Mix.

On September 3, 1998, Paulsen informed the Trumms that FSI was planning to terminate their contract. The following day, the Trumms were presented with a written termination agreement and a bill for feed. The Trumms paid the feed bill but did not sign the termination agreement. FSI continued to accept delivery of SEW pigs, but paid less than the contract price. On December 1, 1998, FSI sent official notification of [*4] termination of the contract based on what it alleged to be material breaches by the Trumms. On August 3, 1999, after some of the herd had tested positive for psuedo rabies, the Trumms sold the entire herd to the federal government.

The Trumms brought suit against FSI, alleging FSI unilaterally terminated the contract without just cause. The Trumms sought $ 73,939 in damages for the cost of holding the pigs longer than twenty-one days, and for the profits it would have received had the contract not been breached. FSI counterclaimed, alleging the Trumms materially breached the contract by not providing quality pigs. FSI claimed the Trumms unilaterally altered the genetics of the herd, and discontinued buying Master Mix feed, causing it damage.

After a trial, the district court entered judgment against FSI in the amount of $ 60,809.00, and dismissed FSI's counterclaim for lack of evidence. FSI appeals.

II. Scope of Review. We review the district court's decision for errors at law. Iowa R. App. P. 4. Where the trial court sits as the fact finder, its findings have the effect of a jury verdict and bind us if they are supported by substantial evidence. *Bazal v. Rhines,* 600 N.W.2d 327, 329 (Iowa Ct. App. 1999). [*5] Evidence is substantial when a reasonable mind could accept it as adequate to reach the same findings. *Id.* We view the evidence in a light most favorable to upholding the district court's judgment. *Benson v. Webster,* 593 N.W.2d 126, 129 (Iowa 1999).

III. Counterclaim. FSI alleges the district court erred in dismissing its counterclaim for lack of evidence. The contract stated, "The SELLER shall produce for delivery to BUYER healthy, high-quality SEW pigs of less than twenty (20) days of age at the time of delivery." FSI claims the term "high-quality SEW pigs" means pigs that cut out at fifty-one percent lean or better as market hogs, and that the SEW pigs provided by the Trumms failed to meet this criteria. FSI also contends the Trumms breached the contract when they unilaterally changed the genetics of the SEW pigs. FSI argues it is entitled to recover its net lost profits.

A. Definition of "High-Quality SEW Pigs." Sale-of-goods contracts are governed by the Iowa Uniform Commercial Code (U.C.C.). *See* Iowa Code § 554.2102 (1999). Under the U.C.C.,

> Terms with respect to which the confirmatory memoranda [*6] of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented a. by course of dealing or usage of trade (section 554.1205) or by course of performance (section 554.2208); and b. by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.
>
> Iowa Code § 554.2202. The U.C.C. defines usage of trade as:
>
> any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.
>
> Iowa Code § 554.1205(2).

FSI first contends the term [*7] "high-quality SEW pigs" is defined by trade usage as pigs that cut out at fifty-one percent lean or better as market hogs. The evidence presented at trial by FSI indicates that the term "high-quality" as defined by Farmland Foods, FSI's buyer, means market hogs cutting out at not less than fifty-one percent lean. However, trial testimony also revealed that different hog buyers used different standards as to the percentage lean considered acceptable and the method by which the lean was measured. Leroy Trumm testified he had heard buyers accepted anywhere from forty-nine to fifty-four percent lean. Trumm also testified that, although he had raised hogs his entire life, he had never heard there was a fifty-one percent lean industry standard. The trial court concluded the evidence failed to establish the industry standard for high-quality SEW pigs is cutting out at not less than fifty-one percent lean. Upon reviewing the evidence presented at trial, we find no error.

B. Genetics. FSI next argues the Trumms breached the contract when they unilaterally changed the genetics

of the SEW pigs they sold to FSI. However, the district court concluded FSI acquiesced to the modification [*8] of the Trumms' breeding stock. Paulsen frequented the Trumms' farm. He had suggested the Trumms try artificial insemination, and consented when the Trumms inquired as to whether they could return to the use of their Seghers terminal boars. When FSI began to complain about the quality of the pigs, Paulsen suggested the Trumms switch to Danbred boars for breeding. An executory contract may be effectively modified by one party with the consent of the other. *Tindell v. Apple Lines, Inc.,* 478 N.W.2d 428, 430 (Iowa Ct. App. 1991). The requisite consent may be either express or implied from acts and conduct. *Id.* We find no error in the district court's assessment that Paulsen's actions were tantamount to a modification of the contract.

Because the Trumms did not breach their contract with FSI, we need not consider the issue of damages incurred by FSI.

IV. Damages. FSI next contends the district court erred in awarding the Trumms damages in excess of $ 60,000. On cross-appeal, the Trumms argue the district court erred in declining to award them damages sustained between April 1 and September 3, 1998 for the extra time in which they were required to house [*9] and feed the SEW pigs.

Under Iowa law, when a contract has been breached the nonbreaching party is generally entitled to be placed in as good a position as he or she would have occupied had the contract been performed. *Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.,* 579 N.W.2d 823, 831 (Iowa 1998). However, the nonbreaching party's recovery is limited to the loss actually suffered by reason of the breach; he is not entitled to be placed in a better position than he would have been in if the contract had not been broken. *Id.*

We find substantial evidence supports the district court's calculation of the Trumms' damages. The trial court had the opportunity to evaluate the credibility of the witnesses, *Tim O'Neill Chevrolet v. Forristall,* 551 N.W.2d 611, 614 (Iowa 1996), and found the testimony of the Trumms' expert witness to be believable and reliable. On this basis, the court awarded the Trumms actual damages for losses they incurred from September 4, 1998 until August 3, 1999 of $ 23,009, and loss of profit damages until the end of the contract on March 1, 2000 of $ 37,800. FSI contends the record is speculative as to whether the Trumms sustained [*10] damages, arguing no evidence was presented regarding the market price of the SEW pigs, the Trumms' lost profit, or costs they saved. *See Data Documents, Inc. v. Pottawattamie County,* 604 N.W.2d 611, 616-17 (Iowa 2000). However, proof of damages need not be shown by mathematical certainty. *Id.* at 616. Rather, the evidence must be sufficient to allow a factfinder to make an approximate estimate of the loss. *Id.* at 617. The Trumms' expert witness calculated the Trumms would have profited $ 6 per head under the contract, factoring the price FSI would have paid minus the cost of raising the pigs. He then calculated the total profit the Trumms would have earned under the contract and subtracted from it the amount the Trumms actually earned. This evidence was sufficient to allow the district court to estimate the loss the Trumms incurred after FSI provided them notice it was terminating the contract.

The district court declined to award the Trumms damages from April 1 to September 3, 1998, when the Trumms housed the SEW pigs an average of seven days longer. The Trumms argue they are entitled to damages for the costs involved in the delay. [*11] Although the Trumms had to pay additional feed for the pigs during that time, the Trumms agreed to do so and continued to sell pigs to FSI, even though FSI refused to pay them for their additional expenses. Therefore, damages are not available to them prior to FSI's notification of the contract termination.

Because the district court properly dismissed FSI's counterclaim and correctly assessed the Trumms' damages, we affirm.

AFFIRMED.

LEXSEE

UNITED STATES OF AMERICA, Plaintiff, vs. VECTOR CORPORATION, Defendant.

No. C 93-48

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, CEDAR RAPIDS DIVISION

1994 U.S. Dist. LEXIS 21330

April 14, 1994, Decided
April 14, 1994, Filed

DISPOSITION: [*1] Defendant's motion to dismiss for failure to state claim upon which relief can be granted denied in part and granted in part.

COUNSEL: For UNITED STATES OF AMERICA, plaintiff: Ana M Martel, US Attorney's Office, Northern District of Iowa, Cedar Rapids, IA.

For UNITED STATES OF AMERICA, plaintiff: Michael F Hertz, Joyce R Branda, Philip A Shaikun, Steve Poliakoff, Stephen J Gripkey, Mitchell J Lazris, US Department of Justice, Washington, DC.

For VECTOR CORPORATION, defendant: Patrick M Roby, Elderkin Law Firm, Cedar Rapids, IA.

For VECTOR CORPORATION, defendant: Gary T Carr, Saint Louis, MO.

For GERALD R ZAHRADNIK, RAE ZAHRADNIK, movants: Patrick M Roby, Elderkin Law Firm, Cedar Rapids, IA.

For GERALD R ZAHRADNIK, RAE ZAHRADNIK, movants: Gary T Carr, Saint Louis, MO.

JUDGES: Michael J. Melloy, Judge, UNITED STATES DISTRICT COURT.

OPINION BY: Michael J. Melloy

OPINION

ORDER

This matter is before the court on the defendant's motion to dismiss for failure to state a claim upon which relief can be granted, filed April 2, 1993 (Document No. 4). This order denies that motion in part and grants it in part.

Background

The defendant, Vector Corporation, had nine separate contracts [*2] with the contractors who managed various government owned-contractor operated munitions manufacturing plants (GOCOs). The contracts required Vector to supply the GOCOs with unique presses and tooling. At the time of the contracts, Vector was the sole supplier available for this equipment.

The government requires that sole source suppliers comply with specific statutory and regulatory rules when negotiating contracts with the GOCOs because sole source contracts by definition cannot be bid competitively. Various regulations require the sole source supplier to submit a cost proposal to the contractor which itemizes expected costs and which the supplier certifies as "accurate, complete, and current." 10 U.S.C. 2306(a) (Truth in Negotiations Act). The regulations address what types of costs may be submitted and whether a particular cost is a direct or indirect cost. The regulations also specifically address the subcontractor's ability to submit sales commissions as a cost of the contract. The government asserts that generally in sole source contracts, reimbursement for sales commissions paid by the subcontractor are not allowed.

In the first six cost proposals between Vector and the various [*3] GOCO contractors, Vector included an expense which it characterized in the proposal as "engineering consulting fees" and which Vector itemized as a direct cost. In the last three cost proposals Vector characterized the cost as "fees to ARI" and again itemized it as a direct expense. The cost was to cover a

12% sales commission Vector had contracted to pay to Automation Resources, Inc. (ARI) for all sales contracts which Vector obtained. The Federal Acquisition Regulations (FAR) define what is a direct cost and what is an indirect cost and requires the two types of expenses to be accounted for differently and reimbursed at different rates. 48 C.F.R. §§ 31.202-203.

The government alleges that the GOCO contractors relied on Vector's original cost proposals when paying Vector for presses and tooling, and that the contractors reimbursed Vector for the fees Vector paid to ARI. The government states that once the contractor had paid Vector, the contractor would then submit a payment voucher to the Army and the Army would pay the contractor the amount of the voucher.

The Complaint

The United States' complaint alleges four causes of action. The defendant asserts that the government's [*4] allegations are insufficient to properly state a claim. [1] The first two counts are based on the False Claims Act, the third count alleges the government made payments under mistake of fact, and the fourth comes under an unjust enrichment theory.

1 The government, within Count II, alleges among other things that Vector submitted a knowingly false statement regarding how many labor hours one contract required. This complaint was not included in the defendant's motion to dismiss.

To state a claim under § 3729(a)(1) of the False Claims Act, the plaintiff must allege the following elements:

(1) The defendant presented or caused to be presented to an agent of the United States a claim for payment,

(2) the claim was false or fraudulent, and

(3) the defendant knew that the claim was false or fraudulent. *U.S. ex rel. Stinson, Et Al. v. Provident Life*, 721 F. Supp. 1247, 1258-59 (S.D. Fla. 1989); *Blusal Meats, Inc v. United States*, 638 F. Supp. 824, 827 (S.D.N.Y. 1986) (*aff'd* 817 F.2d 1007 (2d Cir. 1987)). [*5]

Count I of the government's complaint alleges that Vector, in violation of § 3729(a)(1), caused false claims to be presented to the government for payment. The government states that Vector presented the GOCO contractors with claims for the payment of a direct expense which Vector characterized as "engineering consulting services". The government alleges that Vector misrepresented these services to the GOCO as being for engineering trouble shooting and liaison services to be provided by ARI when, in fact, Vector knew that the charge was really to cover the 12% sales commission Vector was paying to ARI. The government alleges that Vector accounted for money paid to ARI on Vector's own bookkeeping records as "sales expenses" and as indirect expenses and therefore knew both that the fees were not for engineering services nor were they direct costs. The government further alleges that Vector either knew the sales commissions were not allowable expenses on their contracts with the GOCO contractors, or that if they were allowed, that they could only be characterized as indirect expenses.

Vector's claims were paid by the GOCO contractors who then turned to the government for reimbursement [*6] of their payments to Vector. The government alleges that they would not have reimbursed the GOCO contractor had the government known that it was a reimbursement for sales commissions.

To maintain a claim under § 3729(a)(2) of the False Claims Act, the plaintiff must assert the following:

(1) The defendant made, used or caused to be made or used, a record or statement to get a claim against the United States paid or approved,

(2) the record or statement and the claim were false or fraudulent, and

(3) the defendant knew that the record or statement and the claim were false or fraudulent. *Id*.

Under Count II of the complaint, the government reasserts the allegations against Vector stated *supra* and alleges a specific violation of § 3729(a)(2) in that Vector submitted a statement to the GOCO contractor for "engineering consulting services" that was known by Vector to be fraudulent. The government alleges that the GOCO contractor paid Vector on their claim and that the Army reimbursed the GOCO contractor for the payment. The government states that it would not have paid these expenses had they known they were sales commissions.

Count III alleges that payment was made under [*7] mistake of fact. The government asserts that it would not have made payments on the GOCO contractors' claims if they had known that Vector did not actually incur costs for "engineering consulting services" and that Vector had more accurate labor cost data than presented. The government further alleges that Vector's representations were material to the GOCO contractors' award of purchase orders and the government's reimbursement of the GOCO contractors' costs. The government asserts that it was financially damaged by the mistake of payment.

Count IV alleges unjust enrichment. Under this count, the government asserts that the defendant has been unjustly enriched by reason of the GOCO contractors' payments to Vector to which Vector was not entitled. The government asserts that it has been financially harmed by Vector's retention of the money it received from the GOCO contractors.

Motion to Dismiss

A complaint may be dismissed for failure to state a claim only if it "appears beyond doubt that the plaintiff can provide no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). The court [*8] must view the complaint most favorably to the plaintiff and may dismiss the complaint

> "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984). Dismissal is appropriate "as a practical matter...only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. *Bramlet v. Wilson*, 495 F.2d 714, 716 (8th Cir. 1974).

Ring v. First Interstate Mortgage, Inc., 984 F.2d 924, 926 (8th Cir. 1993).

Motion to Dismiss: Counts I and II

Vector asserts that the government's claims under both Counts I and II do not state claims upon which relief may be granted because the GOCO contractors discussed the ARI expense with Vector, and despite how the expense was labeled on the contract, both parties understood what the expense covered. However, Vector is merely stating a factual dispute with the government's complaint and does not give this court a basis upon which to dismiss the action for failure to state a claim. Taking the facts [*9] most favorable to the government, the complaint adequately alleges each necessary element.

Further, even if the GOCO contractor knew exactly what services ARI was rendering, the government may still sue the subcontractor under the FCA. It is Vector's intent and knowledge that is important under the act, not the GOCO contractor's intent and knowledge. *See U.S. Ex Rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991).

Vector also alleges that at least as to the last three cost proposals given to the GOCO contractors, the government cannot claim Vector submitted a false claim, as on these cost proposals Vector itemized the expense as "fees to ARI" and attached a copy of their contract with ARI, as a reference. However, if Vector knew the claim for recovery of sales commission was not allowable or knew that it was only allowable as a direct cost, the claim for reimbursement of "fees to ARI" would still be false under the FCA. Therefore whether or not Vector made a false representation under the final three cost proposals is a factual dispute and not resolvable by a motion to dismiss.

Vector next argues that it was merely making a judgment as to the reimbursabilty [*10] of the fees to ARI by characterizing them as direct expenses and that what it called the expense is irrelevant. Vector asserts that when it signed a form verifying their cost data, that meant it was verifying that all cost and pricing data was correct, but did not mean that its judgment as to the type of expense that the ARI fees actually were was being verified as correct. Vector asserts that it is the GOCO contractors' responsibility to determine what is an allowable cost and what is not. However, if Vector actually labeled the expense as a direct expense knowing it not to be a direct expense and further mislead the government as to the services being supplied by ARI, it would qualify as a fraudulent claim.

Vector also argues that it did not matter how it characterized fees paid to ARI because, as a matter of law, they were allowable as a direct expense and therefore the government cannot claim it suffered any damage. However, the government strongly disputes this assertion, and the court finds that whether the fees were allowable as a direct cost is a mixed question of fact and law. The applicable regulation, 48 CFR §§ 31.205-38, states when direct selling costs *may* be allowable. [*11] This regulation sets up the type of factual situation necessary to find that sales commissions qualify as direct expenses, one factor of which is that the cost of the direct selling efforts be reasonable in amount. The parties strongly contest whether the fees to ARI were reasonable. Vector contends that, as a matter of law, the commission paid was reasonable. However, whether a cost is reasonable is determined by looking at several different factors which depend on the factual circumstances behind the particular cost being disputed. [2] As it is contingent on the factual situation behind the cost proposal, and since that factual situation is in dispute, it would be inappropriate to find, as a matter of law, that the fees paid to ARI were allowable as a direct expense.

2 (b) What is reasonable depends upon a variety of considerations and circumstances, including-

(1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance;

(2) Generally accepted sound business practices, arm's length bargaining, and Federal and State laws and regulations;

(3) The contractor's responsibilities to the Government, other customers, the owners of the business, employees, and the public at large; and

(4) Any significant deviations from the contractor's established practices.

48 CFR 31.201-3(b) Determining Reasonableness

[*12] Vector also argues that, even if this court determines that Vector was required to list the fees paid to ARI as indirect costs, the government cannot prove damages. However, whether the government incurred damages is in factual dispute. Additionally, it is not required that the government prove damages as the FCA allows for the assessment of penalties and costs of litigation whether or not damages are shown. 31 U.S.C. § 3729(a); *Haggod v. Sonoma, supra* at 1421.

Finally, Vector argues that if the 1986 Amendment to the FCA is being used to charge Vector, then the court must dismiss the action as to those contracts in existence prior to the 1986 Amendment. Vector contends that because the 1986 Amendment changed the amount of damages and fines which could be assessed and also changed the definition of "knowingly" to include "deliberate ignorance of the truth," that it therefore cannot be applied retroactively. However, the fact that the damages and fines are to be calculated differently depending on whether the 1982 statute is used or its 1986 Amendment is not reason for dismissal. Neither is the fact that the definition of "knowingly" has been changed. The plaintiff has alleged [*13] facts as to Vector's intent and knowledge that would fall within either definition.

Motion to Dismiss: Counts III and IV

As for Counts III and IV, Vector contends that the government has not stated a claim upon which relief can be granted because the government cannot properly make a claim for restitution against Vector. The right to restitution due to a mistake in payment requires that the payor show that the defendant was unjustly enriched. *U.S. v. Systron--Donner Corp.*, 486 F.2d 249, 251 (9th Cir. 1973). Under this forum state's law, to recover under a theory of unjust enrichment, the following must be shown:

1. An enrichment;

2. An impoverishment;

3. A connection between the enrichment and impoverishment;

4. Absence of a justification for the enrichment and impoverishment; and

5. An absence of a remedy provided by law.

Irons v. Community State Bank, 461 N.W.2d 849, 855 (IA Ct. App. 1990).

Assuming that the government has properly alleged an enrichment and an impoverishment, the government cannot show an adequate connection between the enrichment and the impoverishment, nor can the government show that it does not have an adequate remedy at law. [*14] Generally, the mistake of payment theory is used to recover money from the payee, not from a third party to the payment. Therefore, for the government to show an adequate connection between the government's impoverishment and Vector's enrichment, the government must present a theory that would allow this court to extend mistake of payment theory to cover third parties to the payment. Very few cases discuss this issue and none found allow this court to extend the theory of mistaken payment to the case at bar.

U.S. v. Systron--Donner Corp. 486 F.2d 249 (9th Cir. 1973), recognizes that it is problematic to allow the government to sue a subcontractor under the theory of mistake of payment when the payment was made to the contractor under a valid contract. However, the *Systron-Donner* court does not determine whether the government should be able to obtain restitution from a subcontractor who is not the payee. Instead the court finds that under the particular facts of the case, the subcontractor was enriched, but not unjustly so. [3]

3 Vector argues that *Systron-Donner* should be read so as to find, as a matter of law, that Vector was not unjustly enriched. However, Vector is alleged to have committed fraud in order to obtain the payments made on its behalf whereas the subcontractor in *Systron-Donner* was only found to have mistakenly computed its costs when submitting a bid to the contractor.

[*15] In *A.C. Davenport & Son Co. v. U.S.*, 538 F. Supp. 730 (N.D.Ill. 1982), the government sued a

subcontractor due to a duplicate payment it had made to the contractor. The contractor was not sued as it had gone bankrupt. The court states, in dicta, that had the subcontractor been unjustly enriched by the government's mistake of payment, the government could recover against the subcontractor. *Id*, at 734. However, since the *Davenport* court neither cites authority for this assertion nor relies upon it in reaching its decision, this court does not feel constrained by its pronouncement.

U.S. v. Mead, 426 F.2d 118, 125 (9th Cir. 1970), did allow recovery against a third party to a payment, however, the facts of *Mead* are distinguishable. In *Mead*, various farmers had contracted with Mr. Mead to complete soil conservation projects on their land. The farmers paid Mr. Mead a portion of the expense of the projects with the understanding that the government would pay the rest under its soil conservation program. Mr. Mead erroneously filled out claims for the government's reimbursement and each farmer signed the claim which covered the project constructed on his or her land. [*16] Mr. Mead sent in the forms and because he had erroneously completed them, the government overpaid him for his work.

The *Mead* court, under the doctrine of payment by mistake, found that each individual farmer as well as Mr. Mead was liable to the government for the overpayments. The court found the farmers liable because they had signed the aid applications and because Mead was acting on their behalf. The case at bar is distinguishable as Vector's claims for payment were sent to the contractor and not to the government, and the GOCO contractors did not act on Vector's behalf when they submitted their own claims to the government for payment.

In addition, the government has also failed to allege that it has no adequate remedies at law as required in order for it to recover under unjust enrichment or mistake of payment theories. There does not appear to be any reason why the government could not sue the GOCO contractors under contract and quasi-contract theories for any erroneous payments made to them. Additionally, if the government can show fraud, it can recover from Vector under the FCA.

Accordingly, **It Is Ordered**,

1. Upon the defendant's motion to dismiss for failure [*17] to state a claim upon which relief can be granted, Counts III and IV of the amended complaint are dismissed.

2. Counts I and II of the amended complaint remain.

Done and so ordered this 14th day of April, 1994.

Michael J. Melloy, Judge

UNITED STATES DISTRICT COURT

LEXSEE

Valley Cadillac Corporation, Respondent, v. Mark A. Dick, Appellant.

0321

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT

238 A.D.2d 894; 661 N.Y.S.2d 105; 1997 N.Y. App. Div. LEXIS 4683

April 25, 1997, Decided
April 25, 1997, Filed

PRIOR HISTORY: [**1] (Appeal from Order of Monroe County Court, Connell, J. - Breach of Contract.)

JUDGES: Present--Denman, P. J., Green, Doerr, Balio and Fallon, JJ.

OPINION

[*106] Order unanimously reversed and judgment insofar as appealed from reversed on the law without costs, motion granted and complaint dismissed.

City Court erred in denying defendant's motion, made at the conclusion of plaintiff's case-in-chief, to dismiss the complaint insofar as it purported to assert a cause of action for breach of a contractual warranty. The complaint in this case is a formal pleading "as in supreme court practice" (UCCA 902 [a]). "A complaint for breach of contract must allege the provisions of the contract upon which the claim is based" (*Copeland v Weyerhaeuser Co.,* 124 AD2d 998, *lv dismissed* 69 NY2d 944). It must "set forth the terms of the agreement upon which liability is predicated, either by express reference or by attaching a copy of the contract" (*Chrysler Capital Corp. v Hilltop Egg Farms,* 129 AD2d 927, 928). A "proposed cause of action for breach of express warranty is insufficient because of failure to set forth the terms of the warranty upon which [plaintiff relies]" ([**2] *Copeland v Weyerhaeuser Co., supra,* at 998). The instant complaint does not allege that defendant breached a specific provision of the parties' contract, and the contract is not annexed to the complaint. Further, in responding to defendant's motion to dismiss, plaintiff did not cross-move to amend the complaint to conform the pleadings to the proof. Thus, the court should have granted defendant's motion. (Appeal from Order of Monroe County Court, Connell, J.--Breach of Contract.)

Present--Denman, P. J., Green, Doerr, Balio and Fallon, JJ.

LEXSEE

OTIS WATKINS, and McKINLEE PRUETT, Individually and as Representatives of a Proposed Class v. OMNI LIFE SCIENCE, INC., Successor to Apex Surgical, LLC

CIVIL ACTION NO. 09-10857-RGS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

2010 U.S. Dist. LEXIS 21417

March 9, 2010, Decided
March 9, 2010, Filed

COUNSEL: [*1] For Otis Watkins, Individually and as Representative of a Proposed Class, McKinlee Pruett, Individually and as Representative of a Proposed Class, Plaintiffs: Marilyn T. McGoldrick, LEAD ATTORNEY, Thornton & Naumes, LLP, Boston, MA; Charles S. Siegel, PRO HAC VICE, Water & Kraus LLP, Dallas, TX; Ingrid M. Evans, PRO HAC VICE, Waters, Kraus & Paul, San Francisco, CA.

For Omni Life Science, Inc., Successor to Apex Surgical, LLC, Defendant: James J. Dillon, LEAD ATTORNEY, Brian C. Carroll, Foley Hoag LLP, Boston, MA.

JUDGES: Richard G. Stearns, UNITED STATES DISTRICT JUDGE.

OPINION BY: Richard G. Stearns

OPINION

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO DISMISS

STEARNS, D.J.

Plaintiffs Otis Watkins and McKinlee Pruett are recipients of the Apex Model Replacement Hip (Apex Hip), designed, marketed, and sold by defendant Omni Life Science, Inc. (Omni), the successor to Apex Surgical, LLC (Apex). Although neither plaintiff alleges an Apex Hip malfunction, they claim that the relatively high rate of failure of the Apex Hip places them and members of the proposed class at serious risk of future harm. [1] The failure rate is also alleged to have diminished the market value of their hip implants and those of the putative class [*2] members. Plaintiffs claim they "would not have selected the Defective Hip over other alternative devices but for the uniform representations made by Defendant." Compl. PP 51, 54. Based on the alleged Apex Hip defects and Omni's sales representations, plaintiffs assert claims for breach of implied warranty (Count I), breach of contract (Count II), unjust enrichment and constructive trust (Count III), violations of the Massachusetts consumer protection statute, Mass. Gen. Laws ch. 93A (Count IV), and violations of the consumer protection laws of all other states (Count V). [2] On July 24, 2009, Omni filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). A hearing on the motion was held on November 9, 2009.

1 The proposed class does not include recipients of Apex Hip implants who have experienced an actual failure or malfunction.

2 The named plaintiffs are residents of Oklahoma.

BACKGROUND

The facts, viewed in the light most favorable to plaintiffs as the non-moving parties, are as follows. The Apex Hip was first marketed in 2000. Failures of the Apex Hip began to be reported in 2004. Plaintiffs identify the following defects in design as the explanation for the failures:

> a) the use of [*3] a plug instead of a bolt to connect the stem to the neck; and b) the use of an alignment pin with too small of a diameter (.125"). When used as directed, such defects in the Apex Modular Hip Stem caused the product to have insufficient torsion strength due to a

> shearing of the alignment pin, leading to a deficient modular connection.

Compl. P 34. In 2005, Apex was acquired by Omni. By 2006, Omni personnel had redesigned the Apex Hip in response to the reports of failure.

Before the Apex Hip was redesigned, 1,568 patients received an Apex Hip implant. Among these 1,568 recipients, sixty-five Apex Hips (to date) have failed (a failure rate of 4.15 percent). According to plaintiffs, this rate is sixteen times higher than the 0.27 percent failure rate of other replacement hips. [3] See Opp'n at 16. However, plaintiffs' Apex Hip replacements (and those of the members of the proposed class) have not failed or experienced other problems.

> 3 The comparative failure rate is disputed by Omni. According to Omni, the failure rate of the Apex Hip is 3.38 percent while the 0.27 percent figure relates to a different type of failure than the one alleged to occur in the Apex Hip. Omni also contends that recent, [*4] more comprehensive studies in 2007 show an average relevant failure rate in competing models at a rate of 6.4 percent, demonstrating that "[t]he Apex hip has a higher survival rate than reported in this industry standard reference and is well within the range of failures reported in these two [studies]." Reply at 9 n.1. This argument relies on materials that fall outside the permissible scope of consideration on a Rule 12(b)(6) motion.

DISCUSSION

To survive a motion to dismiss, a complaint must allege "a plausible entitlement to relief." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), disavowing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). "While a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. at 555 (internal citations and quotations omitted). See also Rodriguez-Ortiz v. Margo Caribe, Inc., 490 F.3d 92, 95 (1st Cir. 2007). Dismissal for failure to state a claim will be appropriate if the pleadings fail to set forth "'factual allegations, [*5] either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory.'" Berner v. Delahanty, 129 F.3d 20, 25 (1st Cir. 1997), quoting Gooley v. Mobil Oil Corp., 851 F.2d 513, 515 (1st Cir. 1988). In deciding a Rule 12(b)(6) motion, the court may also look to documents, the authenticity of which are not disputed by the parties, to documents central to the plaintiffs' claims, and to documents referenced in the complaint. Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993).

Choice-of-Law

As a preliminary matter, the parties disagree about the applicable state law. A federal court sitting in diversity applies the choice-of-law framework of the forum state. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941). Under Massachusetts choice-of-law rules, tort claims are governed by the law of the state in which the injury occurred, unless another state has a more significant relationship to the underlying cause of action. Bergin v. Dartmouth Pharm., Inc., 326 F. Supp. 2d 179, 183 (D. Mass. 2004), citing Dunfey v. Roger Williams Univ., 824 F. Supp. 18, 21 (D. Mass. 1993). See Cohen v. McDonnell Douglas Corp., 389 Mass. 327, 333-334, 450 N.E.2d 581 (1983) [*6] (citation omitted) ("The place where the injury occurred is the place where the last event necessary to make an actor liable for an alleged tort takes place."). See also Pevoski v. Pevoski, 371 Mass. 358, 359-360, 358 N.E.2d 416 (1976) ("[T]here also may be particular issues on which the interests of lex loci delicti are not so strong . . . [and] another jurisdiction may sometimes be more concerned and more involved with certain issues than the State in which the conduct occurred.").

Omni argues that the court should apply Oklahoma rather than Massachusetts law because the named plaintiffs are Oklahoma residents and all of the relevant transactions and occurrences took place in Oklahoma where plaintiffs underwent their hip replacement surgery. Omni also claims prejudice in the fact that Oklahoma law requires a showing of an "actual injury," while Massachusetts law is arguably "unsettled" on the point. Omni finally asserts that Massachusetts and Oklahoma would apply different statutes of limitations to plaintiffs' claims (although it makes no argument that plaintiffs' claims would be time-barred under the laws of either state).

Plaintiffs respond that under either Massachusetts or Oklahoma choice-of-law [*7] principles, Massachusetts law applies. [4] In a product defect class action, plaintiffs argue that the deciding factor is the manufacturer's location because it provides a hub linking the spokes of the proposed class. Here, Omni is incorporated in Massachusetts where it also has its headquarters and principal place of business. See Hertz Corp. v. Friend, 175 L. Ed. 2d 1029, 2010 WL 605601, at *11 (U.S. 2010) ("'[P]rincipal place of business' is best read as referring to the place where a corporation's officers

direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's 'nerve center.'"). Plaintiffs also cite a recent Oklahoma Supreme Court case, Cuesta v. Ford Motor Co., 2009 OK 24, 209 P.3d 278, 285 (Okla. 2009), that holds that the law of the domicile state of the manufacturer is controlling in a defective product class action. Finally, plaintiffs argue that the locus of the tort is properly Massachusetts as it is the forum where the design and manufacture of the allegedly defective Apex Hip took place.

> 4 "A federal court sitting in diversity need not make a finding regarding which state's law is to be applied where the case's resolution [*8] would be identical under either state's law." Fratus v. Republic Western Ins. Co., 147 F.3d 25, 28 (1st Cir. 1998).

The court need not probe too deeply into the differences -- such as they are -- between the law of Oklahoma and Massachusetts on the subject because it is as plain as a pikestaff that Massachusetts' interest in regulating the conduct of businesses operating under its laws trumps any interest that Oklahoma might have. If this case were to achieve class action status, some 1,500 class members representing all fifty states would be affected. It stands to reason that among this geographically diverse group, Massachusetts is the only state that would have a substantive tie to all of the class members. See Cuesta, 209 P.3d at 285 ("[W]e find that the law of Michigan, the state of Ford's principal place of business as manufacturer which controlled the specifications, requirements and testing for the pedals, has a greater 'intensity of interest' than any other state involved. Its law should be applied.").

The Element of Injury

"[P]urely economic losses are unrecoverable in tort and strict liability actions in the absence of personal injury or property damage." FMR Corp. v. Boston Edison Co., 415 Mass. 393, 395, 613 N.E.2d 902 (1993). [*9] Count II alleges that Omni breached contracts between it and the purchasers of the Apex Hip; contracts of which plaintiffs claim to be the intended, third-party beneficiaries. While Count II is styled as a contract claim, "couching [tort] allegations in terms of breach of contract . . . does not change the prohibition." Id. at 396 (citations omitted). [5]

> 5 If the court were to consider Count II as a contract claim it would fail for the reason that it omits the essential elements of a contract action. "A breach of contract complaint must allege (1) the existence of a valid and binding contract; (2) that plaintiff has complied with the contract and performed his own obligations under it; and (3) breach of the contract causing damages." Persson v. Scotia Prince Cruises, Ltd., 330 F.3d 28, 34 (1st Cir. 2003), citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1235, at 268-270 (2d ed. 2002). As Omni points out, plaintiffs have not alleged the existence of a contract, or even named the parties to the alleged agreement. Plaintiffs for their part argue that the Apex Hips were not being given away for free and that Omni must have had a contract of sale with someone [*10] (hospitals, surgeons, surgical centers, or health insurance companies) for which they were the intended third-party beneficiaries. See Compl. P 101. Plaintiffs rely solely on an opinion of this court, Brown v. Quest Diagnostics, LLC, 2008 U.S. Dist. LEXIS 101678, 2008 WL 5236033 (D. Mass. Dec. 16, 2008) (Stearns, J.), for the proposition that an "allegation that plaintiff was [an] intended third-party beneficiary of [a] contract [was] sufficient to withstand [a] motion to dismiss, even where defendant denied [the] contract existed." Opp'n at 21, citing 2008 U.S. Dist. LEXIS 101678, 2008 WL 5236033, at *3. Brown is inapposite. While the court expressed skepticism whether Brown was in fact an intended third-party beneficiary, Brown at least was able to identify a supposed contractual agreement. See Reed v. Gen. Implement Export Corp., 9 F.R.D. 182, 183 (N.D. Ohio 1949) ("An oral contract, by its very nature, requires specific identification in pleading as to time, place and parties or agents. In an action on a written contract these facts would be readily ascertainable by reference to an attached copy and, where there is no copy, they should appear in the complaint.").

Omni argues that all Counts of the Complaint should be dismissed because no [*11] legally cognizable injury is pled in any of plaintiffs' claims. See Rule v. Fort Dodge Animal Health, Inc., 604 F. Supp. 2d 288, 304 (D. Mass. 2009) (Woodlock, J.) ("It is necessary for a private plaintiff to show that the defendants' deceptive act caused some form of compensable loss. . . . [Plaintiffs] ha[ve] already received the full benefit of the bargain [they] anticipated when [they] purchased [the product] . . . ."). The rule of Rule applies with the same force in consumer protection actions as it does in breach of warranty cases. See Iannacchino v. Ford Motor Co., 451 Mass. 623, 634, 888 N.E.2d 879 (2008) ("As is true of a claim under G.L. c. 93A, a claim of breach of warranty requires plaintiffs to show that a defendant's conduct has caused them a loss or injury.").

Plaintiffs' stopgap argument is based on a benefit of the bargain theory. Citing Iannacchino, plaintiffs claim that an accident-related injury or a manifested defect need not be shown as a predicate of recovery. They claim that their injuries consist of (1) the apprehension caused by the prospect of an increased risk of hip failure and (2) the extra money that they paid for an overvalued Apex Hip. [6] In both Iannacchino and Rule, [*12] all claims were dismissed because plaintiffs failed to allege a cognizable injury. In Iannacchino, the automobile manufacturer was alleged to have produced faulty door latches, while in Rule heart worm medication for dogs was alleged to be less effective than advertised. Although factual distinctions can be made (Rule did not involve a risk of future harm and Iannacchino involved no reported product failures), the essential point of similarity is that plaintiffs received a product which is (to now) functioning as it was intended.

> 6 Plaintiffs also argue "future injury" in the not yet materialized costs of new hip replacements and additional surgeries, but the manifestation of these injuries would necessarily exclude putative class members actually injured from the class defined in the Complaint. See Compl. P 56 ("Excluded from the Class are those persons implanted with a Defective Hip that has failed and who have been reimbursed for the product's replacement."). To [*13] the extent plaintiffs seek to represent a sub-class of persons who have experienced hip replacement failure and have not yet received reimbursement, the court finds the named plaintiffs unrepresentative of this possible sub-class.

Apprehension of a heightened risk stemming from an allegedly defective product that has not failed or caused harm is insufficient as a matter of law to support a claim. See Anderson v. W.R. Grace & Co., 628 F. Supp. 1219, 1231 n.6 (D. Mass. 1986) ("The weight of authority would deny plaintiffs a cause of action solely for increased risk because no 'injury' has occurred."), cited in Rule, 604 F. Supp. 2d at 305 n.16. Plaintiffs' overpayment argument is also based on a theory of economic loss that has no place in a tort context. [7] See Iannacchino, 451 Mass. at 631, 633, citing Mass. Gen. Laws ch. 93A, § 9.

> 7 Plaintiffs make no allegation in the Complaint that the Apex Hip was noncompliant with government standards. Indeed, the exhibits attached to the Complaint suggest the opposite. See Compl. - Ex. 1, at 7-8.

The one case plaintiffs cite that provides a modicum of support is Holtzman v. Gen. Motors Corp., 2002 Mass. Super. LEXIS 249, 2002 WL 1923883 (Mass. Super. July 2, 2002), a Superior [*14] Court decision issued prior to Iannacchino where a product liability class action with purely economic injury alleged survived a motion to dismiss. By happenstance, in Iannacchino the Supreme Judicial Court adopted the Twombly heightened pleading standard. See 451 Mass. at 635. See also Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (the Rule 12(b)(6) pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation."). It seems more than likely that Holtzman would have been decided differently in the wake of Iannacchino.

Holtzman is also distinguishable on its facts. Plaintiffs in Holtzman were owners of automobiles alleged to be equipped with defective tire jacks. As with plaintiffs' Apex Hips, "none of the plaintiffs' jacks [had] failed, and they may never fail." Holtzman, 2002 Mass. Super. LEXIS 249, 2002 WL 1923883, at *2. The Holtzman holding that a breach of warranty claim was sufficiently pled was based on a finding that the car jacks were "unfit for normal usage" because the products could not be used at all or "without unreasonably placing those nearby in danger of serious bodily injury." Id. By contrast, plaintiffs' hip replacements have functioned properly for from five [*15] to eleven years and, if they do fail, will not expose plaintiffs or innocent bystanders to the possibility of "injury or death." 2002 Mass. Super. LEXIS 249, [WL] at *3. Compare Compl. - Ex. 2 (failure of the Apex Hip is signaled by an "initial popping sound associated with a sense of hip instability . . . . Pain was mild to moderate . . . . All [patients] have gone on to full recovery."). As plaintiffs' claims (which include those disguised as breaches of contract) fail to plead a cognizable injury, a necessary element of a tort action, they must be dismissed.

Fraud/Concealment

Omni further argues that plaintiffs have not adequately pled fraud as required by the claims of fraudulent misrepresentation advanced in Count I (breach of implied warranty), [8] Count III (unjust enrichment), Count IV (Chapter 93A), and Count V (other state consumer protection laws). "[A]ny claim sounding in fraud must satisfy the requirements of the heightened pleadings standard regardless of what label the pleader assigns to it." Declude, Inc. v. Perry, 593 F. Supp. 2d 290, 297 (D. Mass. 2008). "The hallmarks of fraud are misrepresentation or deceit." Ed Peters Jewelry Co., Inc. v. C & J Jewelry Co., Inc., 215 F.3d 182, 191 (1st Cir. 2000). [*16] See also Restatement (Second) of Torts § 525, at 55 (1976) ("One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from

action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation."). Under Fed. R. Civ. P. 9(b), fraudulent misrepresentation falls under a special heightened pleading requirement. [9]

> 8 See Carolet Corp. v. Garfield, 339 Mass. 75, 78, 157 N.E.2d 876 (1959) ("[T]he origins of the action on a warranty lie exclusively in tort for deceit.").
>
> 9 "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). Omni points out that the Complaint does not allege a single affirmative false statement.

Plaintiffs do not contest the fact that their misrepresentation claims sound in fraud. Rather, they maintain that Rule 9(b) has to be read in conjunction with the Rule 8 requirement that pleadings be concise and direct. [10] In plaintiffs' view, the Complaint [*17] is sufficient to give Omni adequate notice of the fraud claims, specifically the allegation that "[Omni] promoted the Defective Hip to potential purchasers of the Defective Hip, using uniform representations warranting that the Defective Hip was dependable, reliable, free from defects and of merchantable quality, or fair use and quality, and fit for its intended purpose." Compl. P 27. Plaintiffs attach an article from a trade publication to the Complaint (Ex. 1) that they characterize as falsely representing "Apex's testing of the Defective Hip and confirming the integrity of the design of the Defective Hip." Compl. P 29. Plaintiffs also reference a 2003 brochure distributed by Apex (Reply - Ex. A) that "asserts and/or asserted that the Defective Hip is designed to optimize stability, eliminate leg length discrepancies and facilitate alignment." [11] Compl. P 31. Plaintiffs seek to address the "who, what, when, where, how, and why," of the alleged fraud in the following fashion.

> A. Who: Apex concealed the defects described in previous paragraph regarding the Defective Hip from Plaintiffs and the Class. Plaintiffs are unaware of, and therefore unable to identify, the true names, identities [*18] and extent of liability of those individuals at Apex responsible for such decisions.
>
> B. What: Apex knew and fraudulent [sic] concealed or intentionally failed to disclose the material facts regarding the defects of the Defective Hip, described in the Complaint.
>
> C. When: Apex concealed this materials [sic] information at all times, starting no later than 1999, continuing through the time of Plaintiffs' purchase of the Defective Hip, and on an ongoing basis until the Defective Hip was redesigned.
>
> D. Where: Apex concealed this material information in its communications with Plaintiffs and the Class in the form of uniform representations.
>
> E. How: Apex concealed this material information by not disclosing it to Class Members. Apex concealed this material information even though it knew or should have known this information and knew or should have known that it would be important to a reasonable consumer in deciding whether to purchase the Defective Hip.
>
> F. Why: Apex concealed this material information for the purpose of inducing Plaintiffs and Class Members to purchase the Defective Hip. Had Apex disclosed the truth, Plaintiffs (and reasonable consumers) would not have purchased the Defective [*19] Hip.

Compl. P 79.

> 10 "A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).
>
> 11 As a general rule, statements of opinion and belief -- so-called "seller's talk" -- touting the value of a product do not constitute false representations under Massachusetts law. Gaucher v. Solomon, 279 Mass. 296, 299, 181 N.E. 238 (1932). The result may be different where an opinion is so peculiarly within the superior knowledge and expertise of its maker that a reasonable recipient would regard it as an assertion of fact. Commonwealth v. Anthony, 306 Mass. 470, 474-475, 28 N.E.2d 542 (1940).

Although plaintiffs make a valiant effort to comply with the formalities of Rule 9(b), they fall short on its substance. Plaintiffs' allegation that Omni knew of the alleged design defect for at least a year before the first

Apex Hip was sold, and intentionally concealed it, might survive a post-Twombly motion to dismiss, but for the contradictory exhibits plaintiffs attach to their Complaint. See Compl. - Ex. 3 ("[T]hese devices were immediately discontinued from clinical use by the authors until redesigned and strength properties [*20] significantly improved."). The exhibits, rather than establishing deliberate concealment, demonstrate Omni's disclosure of testing results suggesting problems with the Apex Hip. See Compl. - Ex. 2 ("Complications still occur in [total hip arthroplasty]. One of these complications continues to be femoral component failure. *This subject needs more open discussion*.") (emphasis added). Another exhibit attached to the Complaint reports fatigue testing of the Apex Hip, with the carefully couched qualifier that the Apex Hip "successfully passed fatigue testing as per the relevant ISO standards and FDA guidance document." Compl. - Ex. 1, at 7. "[O]nly long-term outcome data will provide and demonstrate whether this device will improve clinical scores and survivorship." Id. at 9. See also id. at 7-8, 9 (describing a fracture to the fluted region of the stem during fatigue testing and the dislocation of two hip replacements in patients). Read in the aggregate, the court finds that Omni's alleged misrepresentations, as pled, lack "the capacity to mislead consumers, acting reasonably under the circumstances, to act differently from the way they otherwise would have acted." Aspinall v. Philip Morris Cos., Inc., 442 Mass. 381, 396, 813 N.E.2d 476 (2004). [*21] Because plaintiffs have failed to adequately allege fraud, Counts I, III, IV, and V necessarily fail on this ground as well.

Unjust Enrichment

Unjust enrichment is an "equitable stopgap for occasional inadequacies in contractual remedies at law." Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc., 412 F.3d 215, 234 (1st Cir. 2005). Under the doctrine of unjust enrichment, a plaintiff seeks restitution of a benefit conferred on another whose retention of the benefit at plaintiff's expense would be unconscionable. To satisfy the five elements of unjust enrichment, a plaintiff must show: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and the impoverishment, (4) the absence of justification and (5) the absence of a remedy provided by law." LaSalle Nat'l Bank v. Perelman, 82 F. Supp. 2d 279, 294-295 (D. Del. 2000), citing Jackson Nat'l Life Ins. Co. v. Kennedy, 741 A.2d 377, 393 (Del. Ch.1999). Plaintiffs' unjust enrichment claim fails on the fifth element because adequate remedies at law exist. Where a plaintiff has an adequate remedy at law, a claim of unjust enrichment is unavailable. See McKesson HBOC, Inc. v. New York State Common Retirement Fund, Inc., 339 F.3d 1087, 1093 (9th Cir. 2003) [*22] (Delaware law); One Wheeler Road Assocs. v. Foxboro Co., 843 F. Supp. 792, 799 (D. Mass. 1994) (Young, J.) (federal common law); Popponesset Beach Ass'n, Inc. v. Marchillo, 39 Mass. App. Ct. 586, 593, 658 N.E.2d 983 (1996) (Massachusetts law).

ORDER

For the foregoing reasons, Omni's motion to dismiss is ALLOWED. [12] The Clerk will enter judgment for Omni and close the case.

12 The dismissal is, of course, without prejudice to the rights of any potential plaintiffs who suffer an actual failure of an implanted Apex Hip.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE

LEXSEE

[*1] **Melvyn I. Weiss et al., Appellants, v Polymer Plastics Corporation, Doing Business as Polymer Plastics Corporation Vitricon Division, et al., Defendants and Third-Party Plaintiffs-Respondents, et al., Defendants, et al., Third-Party Defendants. (Index No. 19550/99)**

2003-05936

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

2005 NY Slip Op 6922; 21 A.D.3d 1095; 802 N.Y.S.2d 174; 2005 N.Y. App. Div. LEXIS 9479

September 26, 2005, Decided

COUNSEL: Milberg Weiss Bershad Hynes & Lerach, LLP, New York, N.Y. (Lawrence D. McCabe, Benjamin Y. Kaufman, Matthew A. Kupillas, and Mauro, Goldberg & Lilling [Caryn L. Lilling] of counsel), for appellants.

Ahmuty, Demers & McManus, Albertson, N.Y. (Brendan T. Fitzpatrick and Christopher Kendric of counsel), for defendants third-party plaintiffs-respondents.

Purcell & Ingrao, P.C., Mineola, N.Y. (Patrick J. Purcell and Matthew M. Frank of counsel), for third-party defendant Prima Plastering, Inc.

JUDGES: BARRY A. COZIER, J.P., SONDRA MILLER, WILLIAM F. MASTRO, REINALDO E. RIVERA, JJ. COZIER, J.P., S. MILLER, MASTRO and RIVERA, JJ., concur.

OPINION

[**1095] [***175] In an action, inter alia, to recover damages for fraud, breach of express and implied warranty, strict products liability, and deceptive trade practices, the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Nassau County (Winslow, J.), dated May 16, 2003, as granted that branch of the motion of the defendants third-party plaintiffs Polymer Plastics, Inc., sued herein as Polymer Plastics Corporation, doing business as Polymer Plastics Corporation Vitricon Division, Vitricon, Inc., sued herein as Vitricon Corporation, and EIFS, Inc., which was for summary judgment dismissing the complaint insofar as asserted against them.

Ordered that the order is affirmed insofar as appealed from, with costs.

In 1994 the plaintiffs were constructing a home in Oyster Bay [**1096] Cove. They hired the third-party defendant DMC Cappy, Inc. (hereinafter DMC), as the general contractor for the project, and the third-party defendant Keller Sandgren Associates (hereinafter Keller) as their architect. In [*2] July 1999 the plaintiffs commenced this action alleging damage to the exterior plywood substrate attached to their home as part of the application of a "synthetic stucco" substance known as exterior insulation finish systems, or EIFS, as well as the EIFS itself, which was manufactured by the defendants third-party plaintiffs Polymer Plastics, Inc., sued herein as Polymer Plastics Corporation, doing business as Polymer Plastics Corporation Vitricon Division, Vitricon, Inc., sued herein as Vitricon Corporation, and EIFS, Inc. (hereinafter the Polymer defendants), purchased and installed by the third-party defendant Prima Plastering, Inc. (hereinafter Prima), and selected by DMC and Keller. It is undisputed that the plaintiffs had no direct contact with the Polymer defendants.

Contrary to the plaintiffs' contention, the Supreme Court properly granted that branch of the motion of the Polymer defendants which was for summary judgment dismissing all tort-based causes of action insofar as asserted against them, as barred by the "economic loss" doctrine. The economic loss doctrine provides that tort recovery in strict products liability and negligence against a manufacturer is not available to a downstream purchaser where the claimed losses flow from damage to the property that is the subject of the contract, and personal injury is not alleged or at issue (*see* Bocre Leasing Corp. v General Motors Corp. [Allison Gas

Turbine Div.], 84 NY2d 685, 645 NE2d 1195, 621 NYS2d 497 [1995]; *Atlas Air, Inc. v General Elec. Co.*, 16 AD3d 444, 791 NYS2d 620 [2005]). The rule is applicable to economic losses to the product itself as well as consequential damages resulting from the defect (*see Bocre Leasing Corp. v General Motors Corp. [Allison Gas Turbine Div.], supra* at 693; *Atlas Air, Inc. v General Elec. Co., supra*). The essence of the plaintiffs' claims are that the EIFS did not [***176] perform properly to protect their home and, as a consequence, they have suffered direct loss to the stucco siding itself and consequential damages to the plywood substrate attached to their home in terms of water infiltration through the EIFS. Their tort claims were therefore properly characterized as being for "economic loss" due to product failure, and were dismissed by the Supreme Court accordingly (*see Bocre Leasing Corp. v General Motors Corp. [Allison Gas Turbine Div.], supra* at 693; *Atlas Air, Inc. v General Elec. Co., supra*; *Amin Realty v K & R Constr. Corp.*, 306 AD2d 230, 762 NYS2d 92 [2003]; *Hemming v Certainteed Corp.*, 97 AD2d 976, 468 NYS2d 789 [1983]).

The Supreme Court properly granted that branch of the [**1097] Polymer defendants' motion which was for summary judgment dismissing the plaintiffs' General Business Law § 349 cause of action. To establish prima facie violation of General Business Law § 349, a plaintiff must demonstrate that a defendant is engaging in consumer-oriented conduct which is deceptive or misleading in a material way, and that the plaintiff has been injured because of it (*see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25, 647 NE2d 741, 623 NYS2d 529 [1995]). The plaintiffs failed to meet the threshold requirement of General Business Law § 349 because the Polymer defendants' sale of the EIFS to Prima did not constitute consumer-oriented conduct (*see St. Patrick's Home for Aged & Infirm v Laticrete Intl.*, 264 AD2d 652, 696 NYS2d 117 [1999]). The transaction in this case was between two companies in the building construction and supply industry. It did not involve any direct solicitation by the Polymer defendants, which had no contact with the plaintiffs, the ultimate consumer, as Prima was already exclusively using the Polymer defendants' product during the relevant time period. Significantly, sophisticated business entities such as Keller, DMC, and Prima acted in an intermediary role in the transaction, thereby reducing any potential that a customer in an inferior bargaining position would be deceived (*see St. Patrick's Home for Aged & Infirm v Laticrete Intl., supra*). In short, this was not the type of "modest" transaction that the statute was intended to reach (*see St. Patrick's Home for Aged & Infirm v Laticrete Intl., id.*).

The Supreme Court also properly held that the Polymer defendants met their initial burden of making a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence demonstrating that no material issues of fact exist on their claim that no express [*3] warranty was ever issued to the plaintiffs to sustain their cause of action to recover damages for breach of express warranty (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572, 508 NYS2d 923 [1986]), and that the plaintiffs failed to present any genuine factual issues to rebut the Polymer defendants' prima showing and which would preclude summary relief (*see Zuckerman v City of New York*, 49 NY2d 557, 404 NE2d 718, 427 NYS2d 595 [1980]). Contrary to the plaintiffs' contention, the Polymer defendants' product literature, which they admittedly never reviewed prior to the EIFS installation, does not, under the facts of this case, rise to the level of a warranty which "explicitly extends to [the] future performance of the goods" (*Parrino v Sperling*, 232 AD2d 618, 648 NYS2d 702 [1996] [internal quotation marks omitted]; *Homart Dev. Co. v Graybar Elec. Co.*, 63 AD2d 727, 405 NYS2d 310 [1978]). In any event, since the four-year statute of limitations applies to the causes of action alleging breach of express and implied warranties, those causes of action were [***177] properly [**1098] dismissed as time-barred (*see* Uniform Commercial Code § 2-725; *Ito v Dryvit Sys., Inc.*, 16 AD3d 554, 792 NYS2d 516 [2005]). Cozier, J.P., S. Miller, Mastro and Rivera, JJ., concur.

LEXSEE

Westfield Insurance Company et al., Plaintiffs-Appellants, v. Huls America, Inc. et al., Defendants-Appellees. Westfield Insurance Company et al., Plaintiffs-Appellants, v. Huls America, Inc. et al., Defendants-Appellees, UAP Columbus J.V.326132 et al., Third-Party Defendants- Appellants.

No. 97APE09-1173, No. 97APE09-1208

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

128 Ohio App. 3d 270; 714 N.E.2d 934; 1998 Ohio App. LEXIS 2549; 39 U.C.C. Rep. Serv. 2d (Callaghan) 1021

June 9, 1998, Rendered

SUBSEQUENT HISTORY: As Corrected November 6, 1999.

PRIOR HISTORY: [***1] APPEAL from the Franklin County Court of Common Pleas.

DISPOSITION: Judgment affirmed.

COUNSEL: Ulmer & Berne, Thomas L. Rosenberg and Randall W. Knutti, for plaintiffs-appellants.

Porter, Wright, Morris & Arthur, James S. Oliphant, R. Leland Evans and Stephanie L. Mott; Pepper, Hamilton & Scheetz, Kenneth H. Zucker and Michael Hino for defendant-appellee Huls America, Inc.

Clark, Ward & Cave and Douglas J. May, for third-party defendants-appellants.

JUDGES: YOUNG, J. DESHLER, P.J., and TYACK, J., concur.

OPINION BY: YOUNG

OPINION

[*277] [**938] (REGULAR CALENDAR)

OPINION

YOUNG, J.

Appellants appeal from a February 24, 1997 judgment entry of the trial court granting summary judgment in favor of appellee. Plaintiffs-Appellants insurance companies Westfield Insurance, Cincinnati Insurance, General Accidents Insurance, Indiana Insurance, State Automobile Insurance and Shelby Insurance (hereinafter collectively "Westfield") were insurers of business tenants of appellant-third-party defendant UAP Columbus J.V. 326132 ("UAP Columbus"), owners of the Lane Avenue Shopping Mall ("mall") located in Columbus, Ohio. The mall was managed by appellant-third-party defendant Standard Management Company ("Standard"). Appellant-intervening [***2] plaintiff Hartford Fire Insurance Company ("Hartford") is an insurer of UAP Columbus (hereinafter appellants UAP Columbus, Standard and Hartford will be collectively referred to as UAP).

On January 17, 1994, a TROCAL S-60 system roof covering the mall shattered and leaked. (See HULS' interrogatories to Standard, filed November 7, 1996.) The mall tenants were forced to cease doing business for a period of months while repairs were made. The resulting loss of business caused the tenants economic business loss, which Westfield compensated under the tenants' in-force insurance policies. On January 13, 1995, appellants Westfield filed suit for subrogation from the manufacturer/supplier of the TROCAL roof, appellee-defendant HULS of America, Inc. ("HULS"), which is a successor in interest to the original manufacturer/supplier Dynamit Nobel of America/Kay-Fries Holding Company. The Westfield complaint alleges (1) a product liability claim under R.C. 2307.71 *et seq.*, and (2) a negligent failure of HULS to warn the tenants that the TROCAL system was prone to shattering. Westfield claims the right to file suit as beneficiaries of UAP's right to be warned of the roof defect as original purchasers [***3] of the roof system. Westfield alleges that a defective TROCAL S-60 [*278] roof was the proximate cause of the roof leak at the UAP mall, resulting in

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economic damage to the mall tenants insured by Westfield. See R.C. 2307.79.

On February 21, 1995, appellee HULS filed its answer to Westfield's complaint, and filed a third-party complaint against UAP Columbus and Standard, alleging that UAP Columbus/Standard's failure to replace the roof, after they were warned of its weakened condition, was the cause of the water leakage. UAP Columbus and Standard answered HULS' complaint, asserting counterclaims alleging that HULS was liable to them for violations of the Ohio Product Liability Code (R.C. 2307.71 *et seq*.), negligence, breach of express and implied warranties and misrepresentation of the nature of the TROCAL roof system. On September 15, 1995, Westfield amended its complaint to include as defendants UAP Columbus and Standard. On December 14, 1995, Hartford, [**939] as insurer and subrogee of UAP Columbus/Standard, intervened in the action, filing its complaint against HULS asserting claims against appellee for breach of express and implied warranties, violations of Ohio Product Liability law, [***4] negligence and misrepresentation. In their respective complaints, Westfield alleged economic damage proximately caused by the defective roof and HULS' failure to warn and UAP alleged economic and property damage, including damage to the alleged defective TROCAL roof.

On September 18, 1996, HULS filed its motion for summary judgment against appellants Westfield and UAP claiming that (1) the roof was a fixture and therefore not subject to the provisions of R.C. 2307.71 *et seq*., (2) the warranty claims of appellants were barred because (a) HULS' liability was limited by the terms of the warranty, (b) the warranty terms limited the warranty to maintaining the roof in a watertight condition for the term of the warranty, (c) the limited warranty expressly excluded all other warranties, express or implied, including the warranty of merchantability and fitness for a particular purpose, (d) the warranty term of ten years had expired on May 4, 1991, prior to the filing of appellants' complaint(s), (3) the tort claims of appellants were barred by the economic loss doctrine, and (4) HULS' failure to warn appellants of the shattering tendency of the TROCAL system was not the proximate cause [***5] of the damage claimed.

On February 24, 1997, the trial court entered judgment on its December 30, 1996 decision, granting summary judgment in favor of appellee and against all appellants on grounds that (1) pursuant to the Ohio Supreme Court's holding in *Wireman v. Keneco Distributors, Inc.* (1996), 75 Ohio St. 3d 103, 661 N.E.2d 744, the roof was a fixture and not subject to product liability law, (2) appellants' failure to warn claims were unwarranted and nonapplicable to a fixture, (3) appellants had not shown that HULS' actions were the proximate cause of appellants' injury, (4) all warranty claims were barred by the terms of the warranty or by [*279] the expiration of the warranty period, and (5) the statute of limitations had run on appellants' claims. Appellants sought and were granted certification to appeal pursuant to Civ.R. 54(B). Appellants appealed separately from the trial court's decision, and the appeals were consolidated in this court.

Appellant Westfield and the other appellant insurance companies, assert the following assignment of error:

> "I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT AND THIRD-PARTY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT."

Westfield [***6] presents the following issues for review:

> "A. IN DETERMINING WHETHER A GOOD IS A 'PRODUCT' WITHIN THE MEANING OF § 2307.71(L) OF THE OHIO REVISED CODE, A COURT MUST ASSESS THE GOOD AT THE TIME OF SALE.
>
> "B. EVEN IF *WIREMAN* HAD HELD THAT 'PRODUCTS' ARE TO BE ASSESSED AT THE TIME OF THEIR FAILURE, HULS' ROOFING SYSTEM WOULD STILL CONSTITUTE A 'PRODUCT.'
>
> "C. AS A MOVANT ON A MOTION FOR SUMMARY JUDGMENT, HULS WAS REQUIRED TO INTRODUCE EVIDENCE CONCERNING ITS 'PROXIMATE CAUSE' ARGUMENT."

UAP, asserts the following assignment of error:

> "I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT AND THIRD-PARTY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT."

UAP presents the following issues for review:

> "A. THE TRIAL COURT ERRED IN FINDING THE TROCAL ROOFING SYSTEM WAS NOT A PRODUCT

UNDER THE OHIO PRODUCT LIABILITY CODE.

"B. THE TRIAL COURT ERRED IN HOLDING STANDARD, UAP AND HARTFORD'S CLAIMS BARRED BY THE EXPIRATION OF THE WARRANTY PERIOD.

"C. THE TRIAL COURT ERRED IN FINDING THE WARRANTY ISSUED BY THIRD-PARTY PLAINTIFF, HULS OF AMERICA, INC., DID NOT FAIL OF ITS ESSENTIAL PURPOSE.

"D. AS A MOVANT [***7] ON A MOTION FOR SUMMARY JUDGMENT, HULS WAS REQUIRED TO INTRODUCE EVIDENCE CONCERNING ITS 'PROXIMATE CAUSE' ARGUMENT.

"E. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN HULS COMPLETELY FAILED TO ADDRESS HARTFORD, STANDARD AND [**940] UAP'S MISREPRESENTATION CLAIMS AGAINST THEM."

On appeal, this court is asked to review the trial court's judgment regarding HULS' motion for summary judgment which was submitted to the court below. Summary judgment, Civ.R. 56, is a procedural device designed to terminate litigation and to avoid a formal trial where there is no genuine issue of material fact to be tried and the moving party is entitled to judgment as a matter [*280] of law. In reviewing a summary judgment, the trial and appellate courts use the same standard, that the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion, and if, when so viewed, reasonable minds can come to differing conclusions, the motion should be overruled. *Hounshell v. American States Ins. Co.* (1981), 67 Ohio St. 2d 427, 433, 424 N.E.2d 311. The court must follow the standard set forth in Civ.R. 56, which specifically provides that [***8] before summary judgment may be granted, "it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317, 327, 364 N.E.2d 267. See, also, *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St. 2d 1, 433 N.E.2d 615. The moving party has the burden of showing that there is no genuine issue of material fact as to the critical issue. The opposing party has a duty to submit affidavits or other materials permitted by Civ.R. 56 to show that a genuine issue for trial exists. See *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St. 2d 64, 375 N.E.2d 46. The "duty of a party resisting a motion for summary judgment is more than resisting the allegations in the motion." *Baughn v. Reynoldsburg* (1992), 78 Ohio App. 3d 561, 563, 605 N.E.2d 478. A "motion for summary judgment forces the nonmoving [***9] party to produce evidence on any issue for which that party bears the burden of production at trial." *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St. 3d 108, 570 N.E.2d 1095. See, also, *Dresher v. Burt* (1996), 75 Ohio St. 3d 280, 292-295, 662 N.E.2d 264.

The appellate court in reviewing the grant for summary judgment must follow the standards set forth in Civ.R. 56(C). "'The reviewing court evaluates the record *** in a light most favorable to the nonmoving party.' *** The motion must be overruled if reasonable minds could find for the party opposing the motion." *Saunders v. McFaul* (1990), 71 Ohio App. 3d 46, 50, 593 N.E.2d 24; *Link v. Leadworks Corp.* (1992), 79 Ohio App. 3d 735, 741, 607 N.E.2d 1140. In its review of a grant for summary judgment, an appellate court may review all evidence of record properly submitted to the trial court. Under Civ.R. 56, summary judgment evidence can include "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact *** timely filed." Civ.R. 56(C). As well, the court may consider further testimony pursuant to Civ.R. 56(E).

[***10] Appellants assert collectively the following issues for review: (I) the trial court erred in holding that the TROCAL roof was a fixture and not covered under [*281] Ohio's product liability laws (see Westfield's issues "A" and "B," and UAP's issue "A"); (II) the trial court erred in finding that appellant's "proximate cause" claim against HULS would fail (see Westfield's issue "C" and UAP's issue "D"); (III) the trial court erred in holding that appellants' warranty claims were time barred (see issues "C" and "D" above), (IV) the trial court erred in not finding that HULS' warranty

failed of its essential purpose (see UAP's issues "B" and "C"); (V) and the trial court erred in granting summary judgment to HULS on appellants' misrepresentation claims (see UAP issue "E").

I. Appellants argue that the trial court erred in finding that their product liability causes of action failed on the grounds that the TROCAL roof was not a product but a fixture. This court finds that the trial [**941] court's determination that the TROCAL roof was a fixture is not dispositive of that court's final decision to grant summary judgment in favor of appellee HULS. This court will not, therefore, address appellants' [***11] issues regarding the trial court's determination that the roof was a fixture in light of this court's findings, as outlined below, that summary judgment was proper regardless of whether the roof was a fixture or a product.

Assuming, arguendo, that the TROCAL S-60 roof could be properly deemed a "product" within the meaning of R.C. 2307.71 *et seq*., this court finds that, pursuant to R.C. 2307.71, a "claimant" is a person who asserts a product liability claim; a "claim" is one for compensatory damages for (physical) damage to property, and "economic loss" is direct, incidental, or consequential pecuniary loss, (including) nonphysical damage to property. R.C. 2307.71(A), (M) and (B). R.C. 2307.77 permits an action to be brought if a product is defective in that it does not conform to a manufacturer's representations, and R.C. 2307.79 permits compensatory damages for economic loss that proximately resulted from a defective product where compensatory property damages are recoverable.

While the Westfield appellants may be described as claimants under the above statute in that they bring a claim that the TROCAL roof system was defective in manufacture, design, construction or formulation, [***12] this court notes that appellants' damage, as insurers of the tenants, is economic loss not resulting from loss of property but stems from the tenant's loss of business as a result of the leaking roof. (Paragraph 11 of Westfield's complaint.)

Economic loss is "described as either direct or indirect. 'Direct' economic loss includes the loss attributable to the decreased value of the product itself." *Chemtrol Adhesives, Inc. v. American Mfrs. Mut. Ins. Co.* (1989), 42 Ohio St. 3d 40, 43, 537 N.E.2d 624. Westfield has not suffered direct economic loss attributable to a decreased value of the roof. "'Indirect' economic loss includes the consequential losses sustained by the purchaser of the defective product, [*282] which may include *** lost profits." *Id.* at 44. The *Chemtrol* court held that "an action in strict liability, may be maintained for purely economic loss" by those not in privity with the manufacturer of the defective product. *Id.* at 49. However, the court based its holding on cases in which the economic loss was in fact a "direct" loss attributable to the decreased value of the product itself. *Id.*, citing *Inglis v. American Motors Corp.* (1965), 3 Ohio St. 2d 132, [***13] 209 N.E.2d 583 and *Iacono v. Anderson Concrete Corp.* (1975), 42 Ohio St. 2d 88, 93, 326 N.E.2d 267.

In the instant matter, the Westfield tenants are not purchasers of a defective product, and even if they were to be so construed, their alleged injury is indirect economic loss based upon a claim of lost business profits, and not one based upon the loss of the product's value due to the defect alleged. Here, there is "no liability for pecuniary loss of bargain." *Inglis* at 132. See, also, *LaPuma v. Collinwood Concrete*, 1994 Ohio App. LEXIS 1074 (Mar. 17, 1994), Cuyahoga App. No. 64882, unreported. Therefore, the pure economic loss complained of is not of a type that provides a cause of action under R.C. 2307.71 *et seq*. *Chemtrol* at 40; *Lawyers Cooperative Publishing Co. v. Muething* (1992), 65 Ohio St. 3d 273, 276-277, 603 N.E.2d 969. See, also, R.C. 2307.71.(M), 2307.72(C), 2307.73(A) and 2307.79.

Further, while R.C. 2307.79 permits a product liability claimant to recover "economic loss that proximately resulted from the defective aspect of the product," such recovery is limited to those claimants entitled to recover compensatory damages pursuant to R.C. 2307.73 or 2307.78. Compensatory [***14] damages in a product liability claim are those damages resulting from "death, physical injury to person, emotional distress, or physical damage to property other than the product involved, that allegedly arose from" the defect in the product. R.C. 2307.71(M). Westfield has not alleged compensatory damages pursuant to R.C. 2307.71(M), and therefore are not entitled to recover economic damages pursuant to R.C. 2307.79.

The *Chemtrol* court held that for "actions sounding in negligence, 'the well-established [**942] general rule is that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable.'" 42 Ohio St. 3d at 44. In the "absence of injury to persons or damage to other property the [plaintiff] may not recover for economic losses premised on tort theories of strict liability or negligence." *Id.* at 51.

R.C. 2307.72(C) provides, in part, that:

> "Any [claim for] recovery of compensatory damages for economic loss based on a claim that is asserted in a civil action, other than a product liability claim, is not [*283] subject to sections 2307.71 to 2307.79 of the Revised Code,

> but may occur under [***15] the common law of this state or other applicable sections of the Revised Code."

Although a cause of action may concern a product, it is not a product liability claim within the purview of Ohio's product liability statutes unless it alleges damages other than economic ones, and a failure to allege other than economic damages does not destroy the claim, but rather removes it from the purview of those statutes. *LaPuma, supra.* In order "to recover indirect economic damages in a negligence action, the plaintiff must prove that the indirect economic damages arose from physical injury to person or from tangible *** property damage." *Queen City Terminals, Inc v. Gen. Am. Transp. Co.* (1995), 73 Ohio St. 3d 609, 653 N.E.2d 661, syllabus. Westfield has not shown loss or damage arising from physical injury to person or from tangible property damage, and therefore the doctrine of strict liability in tort is not available for the recovery of appellants' purely economic losses. *Chemtrol* at 44-45. Appellants' causes of action for purely economic damages are not ones that may be brought in a negligence action, and they fail on this ground. 42 Ohio St. 3d at 40.

This court finds that Westfield's [***16] claim is one for purely economic damages and therefore is not a proper claim under the product liability statutes. R.C. 2307.71(M). The trial court did not err or abuse its discretion in dismissing Westfield's actions brought on those grounds, or in granting appellee's motion for summary judgment against appellants' product liability claims.

Westfield further alleges that HULS negligently failed to warn the mall tenants of the defective nature of the TROCAL roof. HULS was informed of the defect in the TROCAL roofing system sometime in September 1990 through a roofing industry warning, and UAP discovered the defect through an independent evaluation of the roof on March 16, 1992. (Roofing Solutions Report, exhibit K, HULS' reply memorandum, filed November 7, 1996.) The roof shattered and failed on January 17, 1994. Westfield alleges that HULS was under a duty to warn UAP of the defect, and that the tenants would have been beneficiaries of any warning that HULS should have given to UAP. Appellants contend that HULS owed a duty to warn the mall tenants, as well as warn UAP, of the TROCAL defect. We disagree.

A cause of action in negligence alleging a defendant's "failure to meet [***17] the duty to warn" is the same as in strict liability actions. A negligence cause of action is "an *alternative* to a strict liability cause of action for failure to warn." (Emphasis *sic*.) *Crislip v. TCH Liquidating Co.* (1990), 52 Ohio St. 3d 251, 256, 556 N.E.2d 1177. However, an "insurer-subrogee cannot succeed to or acquire any right or remedy not possessed by its insured-subrogor." *Chemtrol, supra,* paragraph one of the syllabus. Therefore, the mall tenants must be [*284] able to bring a negligent failure to warn action in their own right before Westfield will be permitted to file suit for subrogation in their place.

To establish actionable negligence it is fundamental that a plaintiff show: the existence of a duty on the part of the defendant toward the plaintiff, a breach of that duty, and an injury proximately caused by such breach of duty. Where there is no duty or obligation of care or caution, there can be no actionable negligence. *Mussivand v. David* (1989), 45 Ohio St. 3d 314, 318, 544 N.E.2d 265; *Strother v. Hutchinson* (1981), 67 Ohio St. 2d 282, 423 N.E.2d 467. See, also, *Jeswald v. Hutt* (1968), 15 Ohio St. 2d 224, 239 N.E.2d 37; *Norwalk v. Tuttle* (1906), [***18] 73 Ohio St. 242, [**943] 76 N.E. 617; *Elster v. Springfield* (1892), 49 Ohio St. 82, 30 N.E. 274. The mere omission of a duty that causes injury is not the foundation of a negligence action unless it results in injury to one for whose protection the duty is imposed. See *Cleveland, Terminal and Valley R.R. Co. v. Marsh* (1900), 63 Ohio St. 236, 58 N.E. 821. While it may be argued that appellee owed a duty to UAP to warn of the possibility of the roof's failure, it is clear from the record that the tenants were not considered as beneficiaries of UAP's rights and benefits with regards to the TROCAL roof. (Lease agreement, exhibit, HULS' reply memorandum, filed November 7, 1996.) See *Drew v. Gross* (1925), 112 Ohio St. 485, 147 N.E. 757; *McCoy v. Engle* (1987), 42 Ohio App. 3d 204, 207, 537 N.E.2d 665.

HULS was under no duty to warn the mall tenants of the roof's propensity to shatter, and Westfield, likewise, cannot support its negligence claim where the defendant owes neither it nor its insured a duty to warn. It was UAP Columbus/Standard that contracted with appellee HULS (then Dynamit/DNA) to provide a TROCAL roof for the Lane Avenue shopping mall. The tenants were not a part [***19] of the agreement between HULS and UAP. In fact, the lease agreement between UAP Columbus/Standard and the mall tenants, under which the tenants contracted with Standard as management company for UAP Columbus, provides that the tenants have no control over or rights in the roof area or its maintenance. Therefore, HULS' duty would have been one to warn UAP Columbus/Standard of any defect in the roof, not the tenants. (Lease agreement exhibit [Section 11], HULS reply memorandum filed November 7, 1996.) While it may be true that the tenants could have benefitted from HULS warning of the defective properties of the TROCAL system, and while HULS

may have owed a duty to warn UAP of such a defect, there is no evidence in the record that HULS owed a duty to the tenants to provide such a warning. Westfield's alleged right to be warned as beneficiaries of UAP's rights is directly derived from any rights that the tenants gained from UAP. As has been stated earlier, UAP's lease specifically states that the tenants have no rights in the roof, and therefore Westfield had no right to be warned by HULS of the roof's condition.

If the Westfield tenants could somehow be considered as having the right [***20] to bring its negligent failure to warn suit, such action is further barred by [*285] the statute of limitations on such actions. Since Westfield's negligence action stems from an assertion that they are beneficiaries of UAP's rights against appellee HULS, it follows that the statute of limitations governing Westfield's action is the same as that applied to any similar action that UAP could bring. A party in privity of contract with the defendant, as UAP is with HULS in the instant matter, may not bring a negligence action seeking purely economic damages against that defendant. *Chemtrol* at 49. Therefore, any claim by UAP against HULS must be based upon some damage to person or property, as well as economic damage. *Id.* The Ohio Supreme court has held that, suits "for [personal] property damage caused by an allegedly defective product *** are controlled by the statute of limitations contained in R.C. 2305.10." *Sun Refining & Marketing Co. V. Crosby Valve & Gage. Co.* (1994), 68 Ohio St. 3d 397, 398, 627 N.E.2d 552.

Westfield's negligence claim is therefore also governed by the two-year statute of limitations set forth in R.C. 2305.10. See, also, *McAuliffe v. W. States Import Co.,* [***21] *Inc.* (1995), 72 Ohio St. 3d 534, 651 N.E.2d 957 (that court held that because R.C. 2307.73, regarding compensatory damages in product liability actions, does not provide a cause of action against a successor corporation that would not exist but for the statute, causes of action brought pursuant to R.C 2307.73 are not governed by the six-year statute of limitations provided by R.C. 2305.07, but by the two-year statute of limitations provided by R.C. 2305.10). Pursuant to R.C. 2305.10, negligence actions such as appellants' must be brought within two years after the cause of action accrues. *Lawyer's Cooperative* at 277. See, also, *Lee v. Wright Tool & Forge Co.* (1975), 48 Ohio App. 2d 148, 356 N.E.2d 303; *Venham v. Astrolite Alloys* (1991), 73 Ohio App. 3d 90, 596 N.E.2d 585.

Courts have held that, for the purposes of the two-year limitation set forth in R.C. 2305.10: [**944]

> "When [a cause of action] does not manifest itself immediately, the cause of action does not arise until the plaintiff knows or, by exercise of reasonable diligence should have known, that he had been injured by the conduct of the defendant *** ." *O'Stricker v. Jim Walter Corp.* (1983) 4 Ohio St. 3d 84, [***22] 447 N.E.2d 727, paragraph two of the syllabus.

If, as Westfield argues, the mall tenants had a right to be warned of the TROCAL defect based upon UAP's rights, their cause of action would have accrued when UAP's cause of action accrued. UAP's cause of action accrued on March 16, 1992, when they knew or should have known that the TROCAL roof system was defective. (Appellee brief at 7.) See, also, Roof Solutions Report, March 16, 1992. The time for bringing a suit for negligent failure to warn would therefore have expired two years later, on March 16, 1994. Westfield filed their action against appellee on January 13, 1995, or approximately ten months after [*286] the time for bringing such suit had expired. The UAP appellants can be said to have filed their suit(s), at the earliest, on the same date as Westfield, or at the latest on the subsequent date that their third-party counterclaims were filed against HULS. Appellants' causes of action for failure to warn were filed after the statute of limitations for bringing such actions had expired. Therefore, the trial court did not err or abuse its discretion in dismissing Westfield's and UAP's negligence claims.

II. Also regarding [***23] appellants' "negligent failure to warn" claims, the record indicates that both the Westfield and UAP have failed to provide support for their claim that HULS' failure to warn the Lane Avenue tenants or UAP of the TROCAL defect was the proximate cause of the injury. *Mussivand* at 318.

> "'One of the hurdles *** standing between proof of negligent failure to warn and ultimate recovery[,] is the necessity of proof of a proximately causal relationship between the negligence and the injury.' *Hargis v. Doe* (1981), 3 Ohio App. 3d 36, 37, 443 N.E.2d 1008 *** .

> "Even if it be proved that a manufacturer failed to warn of a product-related danger, 'it is relevant to show whether the user of the product would have acted in the same manner had a

> proper warning been given.' *** " *Whiston v. Bio-Lab,Inc.* (1993), 85 Ohio App. 3d 300, 305, 619 N.E.2d 1047.

Once a party moving for summary judgment places some evidence before the court which affirmatively shows that the nonmoving party has no evidence to support its claims, the nonmoving party "must proceed to demonstrate affirmatively the facts which would entitle that party to relief." *Baughn* at 563. [***24] See, also, *Dresher* at 293. HULS presented evidence that UAP Columbus and Standard were aware of the alleged defective condition of the TROCAL roof prior to the 1994 leak, and that they had failed to act upon that knowledge to prevent the leak. (Appellees' brief.) Appellants have failed to demonstrate that they would have acted differently had they been warned of the "defect" by HULS rather than by Roofing Solutions. Negligence is without legal consequence unless it is a proximate cause of an injury. *Osler v. Lorain* (1986), 28 Ohio St. 3d 345, 347, 504 N.E.2d 19. In order "to establish proximate cause, foreseeability must be found. In determining whether an intervening cause 'breaks the causal connection between negligence and injury depends upon whether that intervening cause was reasonably foreseeable by the [negligent party]. If an injury is the natural and probable consequence of a negligent act and it is such as should have been foreseen in the light of all attending circumstances, the injury is then the proximate result of the negligence." [*287] *Mussivand* at 321.

The risk "created by the defendant may include the intervention of the foreseeable negligence of others." [***25] *Prosser, Law of Torts* (5 Ed.1984) 304, Section 44. There are, also, intervening causes which could not be contemplated by a person as a consequence of the negligent act, but are [**945] nevertheless considered normal incidents of the risks the defendant has created. *Prosser* at 306. These acts would be considered intervening causes to the injury, but they would not supersede a party's own negligence as the proximate cause of the injury. However, "if the defendant can foresee neither any danger of direct injury, nor any risk from an intervening cause, the defendant is simply not negligent." *Prosser* at 311.

If, arguendo, HULS' failure to warn, either UAP or the tenants, can be considered a negligent act, UAP's subsequent failure to repair the roof or to warn its tenants of the shattering tendency of the roof could be seen as an intervening, superseding cause of the injury.

The record does not provide evidence that UAP's failure to repair the roof or warn its tenants of the roof "defect" derived from a lack of knowledge of the defect caused by HULS' failure to warn. UAP's failure to act on or warn of the roof defect are actions that were (1) not foreseeable by HULS, (2) not a consequence [***26] of HULS' acts or omissions, and (3) not under HULS' control. *Drake v. East Cleveland* (1920), 101 Ohio St. 111, 127 N.E. 469. Given UAP's knowledge of the "defect" on or about March 16, 1992, and evidenced by the fact that subsequent to obtaining such knowledge regarding the roof UAP did not act on or warn the tenants of the defect, UAP has failed to show that it would have warned the tenants or taken action to have the roof repaired even if HULS had warned UAP of the defect. UAP's failure to repair the roof or to warn their tenants of the defect, therefore, constitutes an intervening, superseding cause of the injury alleged by appellants, which removes the negligent effect of HULS' alleged failure to warn. *Id.* See, also, *State Farm Mut. Auto. Ins. Co. v. VanHoessen* (1996), 114 Ohio App. 3d 108, 110, 682 N.E.2d 1048.

Therefore, this court finds that the trial court did not err in granting appellee's motion for summary judgment with regards to appellants' failure to prove proximate cause.

III. UAP filed counterclaims and complaints against HULS which alleged that HULS was negligent in its failure to warn of the TROCAL roof defect, misrepresented the TROCAL roof's fitness [***27] for its intended purpose, breached its warranties both express and implied, and that the TROCAL roof was a defective product under Ohio's product liability law. As discussed above, appellants have failed to [*288] show that appellee's failure to warn of the defect in the TROCAL system was the proximate cause of appellants' injury, and the trial court did not err in granting summary judgment in this regard.

UAP also contends that the court erred in finding that the TROCAL roof was a fixture and not a product, thus barring their product liability claims. As mentioned *supra*, this court finds that appellants' claims are barred whether the TROCAL roof is deemed a product or whether a fixture, and a determination of the status of the TROCAL roof as product or fixture is unnecessary.

If the TROCAL roof is deemed a fixture, the time for bringing an action for injury resulting from a condition of the roof is governed by the fouryear statute of limitation provided by R.C. 2305.09(D), or the ten-year statute of limitation provided by R.C. 2305.14. *Taylor v. Multi-Flo, Inc.* (1980), 69 Ohio App. 2d 19, 429 N.E.2d 1086. See, also, *Adcor Realty Corp. v. Mellon-Stuart Co.* (N.D.Ohio E.D. 1978), [***28] 450 F. Supp. 769. Such an action must be brought within either the four or ten-year period after the action accrued.

R.C. 2305.09(D) and 2305.14. See, also, R.C. 2305.131(C).

As a fixture, the TROCAL roof would be considered defective as installed on May 4, 1981. Therefore, under the laws governing actions arising out of defective fixtures, appellants' claims were time-barred at the latest ten years after installation, or on May 4, 1991. Appellants' actions were not filed until 1995, at least three and one-half years after the time for such filing had expired, and their actions under a fixture theory are barred by the relevant statutes of limitations.

If the TROCAL roof were deemed a product, appellants argue that their product liability and warranty claims are not barred. We disagree. Under a product liability theory, pursuant to R.C. 2307.71 *et seq.*, the time for filing appellants' actions would [**946] be governed by R.C. 2305.10, which provides that a cause of action based on a product liability claim (injury to personal property) shall be brought within two years after the cause of action accrues. R.C. 2305.10(A). See, also, *Dreher v. Willard Constr. Co.* (1994), 93 Ohio App. 3d 443, [***29] 638 N.E.2d 1079. When a cause of action does not manifest itself immediately, the cause of action does not arise until the plaintiff knows or, by the exercise of reasonable diligence, should have known that he had been injured. *Venham* at 90.

The discovery rule announced by the *O'Stricker* court requires two criteria to be met before the limitation period set forth in R.C. 2305.10 commences to run. First, the plaintiff must know or should have reasonably known that he has been injured and second, the plaintiff must know or reasonably should have known that his injury was proximately caused by the conduct of the defendant. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App. 3d 7, [*289] 467 N.E.2d 1378. Appellants knew, at the latest, on March 16, 1992, that HULS, as successor corporation to Dynamit, was responsible for supplying and installing the TROCAL roof at the mall, and appellant had reason to believe that the TROCAL roof was defective, or prone to shattering. See Roofing Solutions Report, March 16, 1992. Their cause of action therefore accrued on March 16, 1992.

UAP's product liability claim is one for compensatory and economic damages, governed by R.C. 2307.73. The Ohio Supreme [***30] Court has held that "causes of action brought pursuant to R.C. 2307.73 are not governed by the six-year statute of limitations provided in R.C. 2305.07" (*McAuliffe*, paragraph two of the syllabus) but instead are governed by the two-year limitation provided by R.C. 2305.10. *McAuliffe* at 540. Therefore, appellants' cause of action based on a product liability claim accrued when appellants discovered, on March 16, 1992, that the TROCAL roofing material was prone to shattering, and the time for bringing such an action began to run on that date. The time for filing their product liability action expired on March 16, 1994, ten months prior to appellants' earliest filing date of January 13, 1995. This court finds that the trial court did not err in finding that appellants' product liability causes of action were barred by the time limitations for filing such claims.

Appellants further argue that their warranty claims are not timebarred. The four-year statute of limitations of R.C. 1302.98(A) governs claims for property damage when, as appellants contend, the transaction concerns a sale of goods. *Prokasy v. Pearle Vision Center* (1985), 27 Ohio App. 3d 44, 499 N.E.2d 387. As has [***31] been stated above, the warranties for the TROCAL roof had expired on May 4, 1991. R.C. 1302.98(A) provides that an "action for breach of any contract for sale must be commenced within four years after the cause of action accrued." A "cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods, *** the cause of action accrues when the breach is or should have been discovered." R.C. 1302.98(B). The United States Court of Appeals for the Sixth Circuit held that, under R.C.1302.98, the cause of action accrues when a plaintiff discovered, or should have discovered, the defect in the product so long as the discovery arose during the warranty period. *Standard Alliance Industries, Inc. v. Black Clawson Co.* (C.A.6 1978), 587 F.2d 813, 821. Appellants did not discover the defect within the warranty period, and the warranty expired on May 4, 1991. UAP's warranty cause of action accrued, therefore, on May 4, 1981, and is time-barred in this respect.

Further, the Ohio Supreme court has held that [***32] when a sophisticated commercial buyer sues for property damage caused by an allegedly defective [*290] product, claims relating to property other than the defective product itself are controlled by the statute of limitations contained in R.C. 2305.10 for personal property or R.C. 2305.09(D) for real property. *Sun Refining* at 397. As has been stated above, and under the *Sun* court's holding, the statute of limitations for real property actions as well as for personal property causes [**947] of action have expired, and appellants' claims for compensatory damages under the warranty are time-barred in this respect.

IV. Appellants also argue that, because of the limitations contained in the TROCAL warranty, the warranty contract itself fails of its essential purpose, and is unconscionable. The limited five-year warranty issued to UAP by Dynamit (DNA), issued May 4, 1981 and

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renewed by UAP for an additional five-year period, provided in part:

> "Dynamit Nobel of America, Inc. (DNA) warrants to maintain the TROCAL roof of the Lane Avenue Shopping Center, in a watertight condition at its own expense for a period of five years from this date provided that the owner gives DNA written notice of [***33] any leaks within 30 days from discovery of such leaks *** .
>
> "This warranty is solely intended to cover any condition caused by defective TROCAL Brand material supplied by DNA, or from installation or ordinary wear and tear thereof. It shall not include any condition due to lightning, full gales, hailstones, hurricanes or similar sudden unusual natural occurrences or any condition caused by any deliberate act or negligence in maintaining said roof *** . LIABILITIES HEREUNDER SHALL BE LIMITED SOLELY TO THE COST OF REPAIR OR INSTALLATION OF NEW TROCAL BRAND MATERIAL BY AN AUTHORIZED TROCAL APPLICATOR. DNA shall have no responsibility for any damage to other components of the roof or of the building, nor for any incidental or consequential damage. This warranty shall be governed by and construed in accordance with the laws of the State of New York.
>
> "This warranty will not cover damage due to repair or subsequent work on or through the roof without DNA's written approval of the methods and materials to be used.
>
> " ***
>
> "THE PARTIES AGREE THAT THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND ALL OTHER [***34] WARRANTIES, EXPRESS OR IMPLIED, ARE EXCLUDED FROM THIS TRANSACTION AND SHALL NOT APPLY TO THE GOODS SOLD."

Before reaching a determination as to whether the warranty fails of its essential purpose or is unconscionable, it must first be noted that the parties had [*291] expressly agreed that "this warranty shall be governed by and construed in accordance with the laws of the State of New York." The Ohio Supreme Court has held that "a forum selection clause contained in a contract between business entities is valid and enforceable, unless it can be clearly shown that enforcement of the clause would be unreasonable and unjust." *Kennecorp Mtge. Brokers, Inc. v. Country Club Convalescent Hosp., Inc.* (1993), 66 Ohio St. 3d 173, 176, 610 N.E.2d 987. Absent such unjust or unreasonable enforcement, the "law of the state chosen by the parties to govern their contractual rights and duties will be applied." *Schulke Radio Productions, Ltd. v. Midwestern Broadcasting Co.* (1983), 6 Ohio St. 3d 436, 438, 453 N.E.2d 683.

Both Ohio and New York law permit parties to a contract to exclude or modify warranties, expressed and implied, accompanying a sale of goods. See R.C. 1302.29. Upon review [***35] and comparison of the New York laws (New York Uniform Commercial Code Chapter 553, Article 2, Part 3, Sections 2-313 through 2-318) (see attached appendix) and Ohio state laws (Ohio Revised Code, Title 13, Chapter 1302 (Sales), Sections 1302.26 through 1302.31) regarding the sale of goods, we find that the relative New York ("NY") code sections are of sufficiently similar effect such that it is not unjust or unreasonable to construe the warranty regarding the sale and use of the TROCAL roof within Ohio pursuant the NY code section governing such goods.

Appellants contend that the warranty failed of its essential purpose and is unconscionable in its limitations. Appellee argues that the warranty terms are clear and that it fulfilled the warranty conditions, and the warranty did not fail thereby. The question of whether contract terms are clear or ambiguous is a question of law for the court. *Ohio Historical Society v. General Maintenance & [**948] Engineering Co.* (1989), 65 Ohio App. 3d 139, 146, 583 N.E.2d 340. Regarding warranties, Ohio courts have held that in order to:

> " *** constitute a valid contract there must be parties capable of contracting, a lawful subject matter, a [***36] sufficient consideration, a meeting of the minds of the parties, an actual agreement between the parties to do or to forbear doing the thing proposed in the agreement, and a compliance with the law in respect of any formal requisites which may pertain to the contract. *** *Will v. View Place Civic Assn.* (1989), 61 Ohio Misc. 2d 476, 483, 580 N.E.2d 87, citing *Feldman v. Roth* (1932), 12 Ohio L. Abs. 121.

As in Ohio, NY law provides that parties may limit or exclude from their warranties all express or implied warranties, limit or exclude the implied warranties of merchantability and fitness for a particular purpose, and limit remedies for breach of warranty. NY U.C.C. 553 Section 2-316. The Ohio Supreme court has held that "waiver as applied to contracts is a voluntary relinquishment of a known right." *The White Co. v. The Canton Trans. Co.* (1936), 131 Ohio St. 190, 2 N.E.2d 501. Contracting "parties are free to [*292] determine which warranties shall accompany their transaction. Accordingly, both the implied warranties of merchantability and of fitness may be excluded or modified, if the exclusion or notification meets the criteria set forth in R.C. 1302.29(B)." *Chemtrol* [***37] at 55. This court finds that the contracting parties in the instant matter, HULS and UAP Columbus, are business entities who had voluntarily entered into a limited warranty agreement, whereby certain rights were gained and certain others relinquished.

Express warranties regarding goods can be created by a seller of the goods by affirmation, promise or description of the qualities of the goods sold. R.C. 1302.26. See, also, NY U.C.C. Section 2-313. NY U.C.C. Section 2-317(c) provides that any express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose. However, NY U.C.C. Sections 2-314 and 2-315 further provide that the implied warranties of merchantability and fitness for a particular purpose may be excluded or modified pursuant to the provisions contained in Section 2-316.

A party seeking to exclude or modify the implied warranties of merchantability or fitness for a particular use, or any part thereof, must do so in writing and in a conspicuous manner. R.C. 1302.29(B). See, also, NY U.C.C. 2-316(2). The term "conspicuous" is defined by the Ohio Revised Code as being "so written that a reasonable person against [***38] whom it is to operate ought to have noticed it. A printed heading in capitals *** is 'conspicuous.' Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color." R.C. 1301.01(J). See, also, NY U.C.C. 1-201(10). From the record, this court finds that the disclaimer language in appellee's two-page warranty was conspicuous pursuant to R.C 1302.29(B).

R.C. 1302.93(A)(1) provides, in part, "the agreement *** may limit *** the buyer's remedies to *** repair and replacement of nonconforming goods or parts." Courts have held that " section 1302.93(A)(2) of the Ohio Revised Code provides: 'Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.'" *Cannon v. Neal Walker Leasing, Inc.*, 1995 Ohio App. LEXIS 2839 (June 28, 1995), Summit App. No. 16846, unreported.

The record indicates that the limitation of HULS' liability to the cost of repair or replacement of the roof was done in accordance with the provisions for limiting remedies set forth in R.C. 1302.29(D) and 1302.93(A), and is the sole remedy agreed upon by the parties. See, also, NY U.C.C. 2-715 and 2-719. Appellee limited the warranty [***39] liability and also limited the remedies available to appellant under the warranty. See *Cannon, supra.* The limitations of remedies is also conspicuous, in that it directly follows the limitation of damages and is so written that a reasonable person ought to have noticed it, and is in accord with the [*293] relevant provisions of the Revised Code. See R.C. 1302.93(C) and NY U.C.C. 2-719. See, also, *Ins. Co. of North America v. Automatic Sprinkler* [**949] *Corp.* (1981), 67 Ohio St. 2d 91, 96-97, 423 N.E.2d 151.

A party may limit or disclaim the implied warranty of fitness of a product "for its intended use, *** provided the disclaimer is not unconscionable." *Irving Leasing Corp. v. M & H Tire Co.* (1984), 16 Ohio App. 3d 191, 193, 475 N.E.2d 127. A warranty disclaimer that leaves a party with a defective product and no avenue for recourse against the manufacturer is unconscionable. However, a warranty in which the party disclaiming warranties or remedies assumes some form of responsibility for the performance or maintenance of the product in issue is not unconscionable. *Id.* at 194-195. Pursuant to R.C. 1302.15(A), a determination of whether or not a warranty is unconscionable is determined [***40] from the facts "at the time [the warranty] was made." See, also, NY U.C.C. Section 2-302(1).

At the time the warranty was made, appellee's warranty provided that HULS warranted "to maintain the TROCAL roof of the Lane Avenue Shopping Center, in a watertight condition at its own expense for [the term of

the warranty period]," here ten years, and that the warranty covered "any condition caused by defective TROCAL Brand material supplied by DNA, or from installation or ordinary wear and tear thereof." From the language of the warranty, it appears that HULS only obligation was to maintain the TROCAL roof in a watertight condition for the warranty period (of ten years), which corresponds to the expected service life of the roof. See Westfield memorandum in opposition, filed October 21, 1996, at 12-13. The language of appellee's warranty makes it clear that "the implied warranties of merchantability and fitness for a particular purpose and all other warranties, express or implied, are excluded" from the warranty, and that the liability of HULS is limited to only the cost of repair or installation of new TROCAL brand material. The HULS' warranty provided an avenue of recourse for [***41] repair of the roof and the record shows that the roof was maintained in a watertight condition for the warranty period. Therefore, the warranty did not fail and was not unconscionable in this regard.

Appellants argue that appellee had also made express warranties in the TROCAL roof system by affirmation, promise or description, pursuant to R.C. 1302.26, by asserting that the roof system "stays watertight," "resists thermal shock," and "requires little or no maintenance." Further, appellants contend that appellee misrepresented the roof system by making misleading statements that the roof "was a high quality roof system; that the Trocal Roof System would remain leak-free; that the Trocal Roof System was a suitable replacement [for the mall roof]; and that the Trocal Roof System resists thermal shock due to radical temperature fluctuations." (Hartford complaint at 7-8.) From the record it appears that the roof [*294] remained watertight for a total period of thirteen years from installation, or approximately two and one-half years after the expected service life of the roof had expired. See Westfield memorandum in opposition, filed October 21, 1996. The record indicates that the roof satisfied [***42] the requirements of a mall roof for its service life and that it did resist temperature fluctuations up to and beyond the expiration of the warranty period.

This court finds that appellee's warranty was not unreasonable in its limitations, and that appellants were given the remedy of repair or replacement of any defect in the roof during the ten-year warranty period. Such limitations are permitted by law, and were voluntarily agreed to by business entities. As such, the warranty is not unconscionable in this regard. *Irving* at 194. See, also, *Barksdale v. Van's Auto Sales, Inc.* (1989), 62 Ohio App. 3d 724, 577 N.E.2d 426; *Ohio Savings Bank v. H.L. Vokes Co.* (1989), 54 Ohio App. 3d 68, 560 N.E.2d 1328; *Eckstein v. Cummins* (1974), 41 Ohio App. 2d 1, 321 N.E.2d 897. Further, this court finds that the agreement excluded liability for consequential or incidental damages that may have resulted from a defective TROCAL roof. The record reflects that the roof resisted thermal shock due to temperature fluctuations and was maintained in a watertight condition for the ten-year warranty period, and remained leak-free for a total of thirteen years. This court finds that the warranty [***43] did not, therefore, fail of its essential purpose, namely of [**950] keeping the roof watertight and leak-free for a period of ten years.

Further, by the language of NY U.C.C. Section 2-318, while it is reasonable to include the tenant merchants of Lane Avenue mall as "such person [who] may use, consume or be affected by the goods," the statute encompasses only that person "who is injured in person by breach of warranty." The tenants were not injured in their person by HULS alleged breach of warranty and therefore are not considered beneficiaries of the warranty under New York law. By extension, the insurance companies who insured the tenants are not in privity with appellee in this respect, and cannot bring action under the warranty. *Chemtrol* at 40. See, also, *Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Assn.* (1990), 54 Ohio St. 3d 1, 8, 560 N.E.2d 206.

Therefore, this court finds that the trial court did not err in determining that the statute of limitations had expired on appellants' warranty claims or finding that appellants had failed to prove that they had an action under the warranty, and in granting summary judgment to appellee in this regard.

V. Finally, [***44] appellants allege that appellee misrepresented the roof as a high quality roof that would remain leak-free and resist temperature shock. Appellants' misrepresentation claims fail whether grounded in products liability [*295] or presented as fraudulent or negligent misrepresentation. The United States Court of Appeals for the Sixth Circuit has held that a fiberglass roof advertised as "strong, light, [and] leakproof," was commercial puffery not subject to liability under R.C. 2307.77. *Jordan v. Paccar, Inc.* (C.A.6 1994), 37 F.3d 1181, 1183-1185. But even if appellants' misrepresentation claim were applicable to a products liability action, a plaintiff:

> " *** seeking to recover for injuries incurred through the use of a product that does not conform to a manufacturer's representation, [pursuant to R.C. 2307.77] must prove:

> "(1) that the manufacturer made a representation as to a material fact concerning the character or quality of the manufacturer's product;
>
> "(2) that the product did not conform to that representation;
>
> "(3) that the plaintiff justifiably relied on that representation; and
>
> "(4) that the plaintiff's reliance [***45] on the representation was the direct and proximate cause of the plaintiff's injuries." *Gawloski v. Miller Brewing Co.* (1994), 96 Ohio App. 3d 160, 165, 644 N.E.2d 731.

This court finds that the roof conformed to the representations made by appellee. See Hartford complaint at 5-8. The warranty did not represent the TROCAL roof as anything other than a roof that would remain watertight throughout the warranty, absent any defect. The warranty in question limits the warranty to the repair of the roof during the warranty period and states that the "warranty is solely intended to cover any condition caused by defective TROCAL Brand material." Clearly, the possibility that the TROCAL roof could contain a defect is indicated by the warranty. Further, there is no reflection in the record that appellee represented the roof as one that would last for more than ten years. There is no indication that appellee misrepresented its TROCAL roof with regard to its properties, or that the roof failed to conform to the representations made. Also, as has been stated earlier, appellants have failed to demonstrate that their reliance on the representation was the direct and proximate cause of [***46] the plaintiff's injuries. Appellants have, therefore, not shown that they have a sustainable claim of misrepresentation pursuant to R.C. 2307.77.

Misrepresentation or false representation is also an essential element of the tort of fraud. 50 Ohio Jurisprudence 3d (1984, Supp.1997) 376, Fraud and Deceit, Section 26. The elements of fraudulent misrepresentation are:

> "'1. A false representation; actual or implied, or the concealment of a matter of fact, material to the transaction; made falsely.
>
> "'2. Knowledge of the falsity -- -- or statements made with such utter disregard and recklessness that knowledge is inferred.

[**951]

> "'3. Intent to mislead another into relying on the representation.

[*296]

> "'4. Reliance -- -- with a right to rely.
>
> "'5. Injury as a consequence of that reliance. All of these elements must be present if actionable fraud is to be found. The absence of one element is fatal to recovery.'" *Manning v. Len Immke Buick* (1971), 28 Ohio App. 2d 203, 205, 276 N.E.2d 253.

Similarly, the doctrine of "negligent misrepresentation *** provides a tort vehicle for recovery of economic damages that arise from the breach of [***47] a contractual duty, where information is negligently supplied for the guidance of others in their business transactions, and a foreseeable recipient of such information justifiably relies upon it" and suffers injury as a proximate cause of the negligent act. *Wodek v. Brandt Construction, Inc.*, 1997 Ohio App. LEXIS 941 (Mar. 19, 1997), Medina App. No. 2578-M, unreported, citing *DeCapua v. Lambacher* (1995), 105 Ohio App. 3d 203, 206, 663 N.E.2d 972.

As has been stated above, there is no indication that appellee knowingly, or with reckless and utter disregard of the consequences, misrepresented its TROCAL roof with regard to its properties, or that appellee intended to mislead appellant by the representations made. Also, as has been stated earlier, appellants have failed to demonstrate that their reliance on the representation was the direct and proximate cause of the plaintiff's injuries. Appellants have, therefore, not shown that they have a sustainable claim of common law misrepresentation.

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This court therefore finds that the warranty did not fail in its essential purpose or that the appellee did not misrepresent the TROCAL roof.

For the foregoing reasons, this court finds that the trial court did [***48] not err in granting summary judgment in favor of appellee HULS, and appellants Westfield's and UAP's assignments of error are overruled and the decision of the trial court is affirmed. The issue of whether the TROCAL roof is a product or a fixture is moot and is not addressed.

Judgment affirmed.

DESHLER, P.J., and TYACK, J., concur.

APPENDIX

The relevant New York U.C.C. Sections in question are as follows:

§ 1-201. General Definitions

Subject to additional definitions contained in the subsequent Articles of this Act which are applicable to specific Articles or Parts thereof, and unless the context otherwise requires, in this Act:

[*297] ***

(10) "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous". Whether a term or clause is "conspicuous" or not is for decision by the court.

§ 2-302. Unconscionable Contract or [***49] **Clause**

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

§ 2-313. Express Warranties by Affirmation, Promise, Description, Sample

[**952] (1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform [***50] to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

§ 2-314. Implied Warranty: Merchantability; Usage of Trade

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a [*298] merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are [***51] fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

128 Ohio App. 3d 270, *; 714 N.E.2d 934, **;
1998 Ohio App. LEXIS 2549, ***; 39 U.C.C. Rep. Serv. 2d (Callaghan) 1021

§ 2-315. Implied Warranty: Fitness for Particular Purpose

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

§ 2-316. Exclusion or Modification of Warranties

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent [***52] with each other; but subject to the provisions of this Article on parol or extrinsic evidence. (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

[*299] (a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

[**953] (b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there [***53] is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

§ 2-317. Cumulation and Conflict of Warranties Express or Implied

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

§ 2-318. [***54] **Third Party Beneficiaries of Warranties Express or Implied.**

A seller's warranty whether express or implied extends to any natural person if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of the section.

§ 2-715. Buyer's Incidental and Consequential Damages

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

[*300] (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

§ 2-719. Contractual Modification [***55] **or Limitation of Remedy**

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages

recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

LEXSEE

[*1] **Arthur Wirsing et al., Appellants, v Donzi Marine Inc., et al., Respondents, et al., Defendants. (And a Third-Party Action.)**

2004-09377, (Index No. 11293/00)

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

2006 NY Slip Op 5005; 30 A.D.3d 589; 818 N.Y.S.2d 148; 2006 N.Y. App. Div. LEXIS 8197

June 20, 2006, Decided

PRIOR HISTORY: Wirsing v. Donzi Marine, Inc., 2004 N.Y. Misc. LEXIS 3159 (N.Y. Sup. Ct., May 28, 2004)

HEADNOTES

Pleading--Sufficiency of Pleading--Fraud

COUNSEL: Lawrence Bernstein, New York, N.Y. (Jennifer E. Tucek of counsel), for appellant.

Kennedy Lillis Schmidt & English, New York, N.Y. (Vipul Soni and Thomas M. Grasso of counsel), for respondent Donzi Marine, Inc.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York, N.Y. (Michael L. Boulhosa and Debra A. Adler of counsel), for respondent Chesapeake Atlantic Yacht Sales, Ltd.

JUDGES: CRANE, J.P., MASTRO, SKELOS and DILLON, JJ., concur.

OPINION

[**589] [***149] In an action, inter alia, to recover damages for fraud, the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Richmond County (Giacobbe, J.), dated May 28, 2004, as denied their cross motion for leave to amend the complaint.

[**590] Ordered that the order is affirmed insofar as appealed from, with one bill of costs.

The plaintiffs allege that in May 1999 they bought a speed boat, manufactured by the defendant Donzi Marine, Inc. (hereinafter Donzi), from the defendant Cape Island Yacht Sales, Inc. (hereinafter Cape Island). The defendant Chesapeake Atlantic Yacht Sales, Inc. (hereinafter Chesapeake), acquired the boat from Donzi in 1997. The plaintiffs alleged that they relied on false representations made by all of the defendants that the boat was a new 1998 Donzi boat. They allege that one engine was never operational and the other malfunctioned soon after the purchase.

Following discovery, Donzi and Chesapeake each moved for summary judgment. [*2] They argued that there was no evidence that they had made any representations to the plaintiffs in connection with their purchase of the boat from Cape Island, or that the plaintiffs had relied on any such representations in deciding to purchase the boat. The plaintiffs cross-moved for leave to amend the complaint to allege with greater factual specificity that Donzi and Chesapeake had made fraudulent misrepresentations to them through their agent, Cape Island, concerning the origins and condition of the boat.

The Supreme Court granted summary judgment in favor of Donzi and Chesapeake. The Supreme Court properly denied the plaintiffs' cross motion for leave to amend their pleadings as to their fraud cause of action, as the proposed pleading alleging fraudulent misrepresentation was patently devoid of merit under the particular circumstances of this case (*see* *Leszczynski v Kelly & McGlynn*, 281 AD2d 519, 520, 722 NYS2d 254 [2001]; *Tarantini v* [***150] *Russo Realty Corp.*, 273 AD2d 458, 459, 712 NYS2d 358 [2000]). The proposed amended complaint failed to allege the existence of a confidential or fiduciary relationship between the plaintiffs and Donzi or Chesapeake, as required for a viable cause of action sounding in fraud for any failure to disclose (*see* CPLR 3016 [b]; *Williams v Upjohn Health Care Servs.*, 119 AD2d 817, 819, 501 NYS2d 884 [1986]; *County of Westchester v Welton Becket Assoc.*,

102 AD2d 34, 50-51, 478 NYS2d 305 [1984], *affd* 66 NY2d 642, 485 NE2d 1029, 495 NYS2d 364 [1985]).

Crane, J.P., Mastro, Skelos and Dillon, JJ., concur.

LEXSEE

KIMBERLY S. WOESTE, ADMINISTRATRIX OF THE ESTATE OF THOMAS WOESTE, DECEASED, Plaintiff-Appellant, vs. WASHINGTON PLATFORM SALOON & RESTAURANT, Defendant-Appellee, JOHNNY'S OYSTER & SHRIMP, INC., Defendant-Appellee, and LEAVINS SEAFOOD, INC., et al., Defendants.

APPEAL NO. C-050030, TRIAL NO. A-0105244

COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON COUNTY

163 Ohio App. 3d 70; 2005 Ohio 4694; 836 N.E.2d 52; 2005 Ohio App. LEXIS 4225

September 9, 2005, Date of Judgment Entry on Appeal

NOTICE:

THESE ARE NOT OFFICIAL HEADNOTES OR SYLLABI AND ARE NEITHER APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

PRIOR HISTORY: Civil Appeal From: Hamilton County Court of Common Pleas.

COUNSEL: For Appellees: Clifford C. Masch and Timothy B. Schenkel.

For Appellant: William E. Santen, Jr.

JUDGES: SYLVIA S. HENDON, Judge.

OPINION BY: SYLVIA S. HENDON

OPINION

[***55] [*73] *DECISION*

Judgment Appealed Form Is: Affirmed

SYLVIA S. HENDON, Judge.

[**P1] Plaintiff-appellant Kimberly Woeste, administratrix of the estate of Thomas Woeste, has appealed, on behalf of the estate's beneficiaries, the trial court's grant of summary judgment without explanation in favor of defendants-appellees Washington Platform Saloon and Restaurant (hereinafter "Washington Platform") and Johnny's Oyster and Shrimp, Inc. (hereinafter "Johnny's").

Vibrio Vulnificus

[**P2] Thomas Woeste died as a result of contracting the bacteria vibrio vulnificus after eating raw oysters at Washington Platform. Vibrio is a naturally occurring bacteria in oysters that are harvested in warm waters. The oysters ingest the bacteria as they filter feed. Vibrio has no effect on the large majority of the population; however, it can cause death or serious bodily injury to certain people with weakened or impaired immune systems. Woeste suffered from Hepatitis C and cirrhosis of the liver, making him particularly susceptible to vibrio.

[**P3] Woeste consumed approximately one dozen raw oysters while at Washington Platform. The oysters Woeste consumed were harvested in Texas by Johnny's. Washington Platform's menu contained a warning regarding the dangers of eating raw shellfish. Woeste, however, ordered the oysters without opening the menu and reading the warning. Woeste died one week after contracting vibrio from the raw oysters.

[**P4] Appellant contends that summary judgment was improper because genuine issues of material fact were present in the allegations against both Washington Platform and Johnny's. Appellant alleges that Washington Platform was both negligent and strictly liable for failing to adequately warn of the dangers of eating raw oysters, and that the restaurant violated Ohio's Pure Food and Drug Law [1] by receiving and delivering adulterated oysters. Appellant further alleges that Johnny's was negligent for breaching a duty not to abuse the temperature of the oysters when harvested, that Johnny's should have been held strictly liable for failure to warn of the dangers associated with the oysters, and that Johnny's violated Ohio's Pure Food and Drug Law by receiving or distributing [*74] adulterated oysters.

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Summary judgment was granted on all the estate's claims.

1 R.C. Chapter 3715.

[**P5] Summary judgment may appropriately be granted when there exists no genuine issue of material fact, the movant is entitled to judgment as a matter of law, and the evidence, when viewed in favor of the non-moving party, permits only one reasonable conclusion that is adverse to the non-moving party. [2] We review grants of summary judgment de novo, without any deference to the trial court's decision. [3] We now address the claims against each appellee in turn.

2 *State ex rel. Howard v. Ferreri* (1994), 70 Ohio St.3d 587, 589, 1994 Ohio 130, 639 N.E.2d 1189.
3 *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 1996 Ohio 336, 671 N.E.2d 241.

Washington Platform

[**P6] Appellant claims that Washington Platform was both negligent and strictly liable for failing to provide an adequate warning regarding the dangers associated with raw oysters. "The standard [***56] to be imposed upon the defendant in a strict liability claim grounded upon an inadequate warning is the same as that imposed in a negligence claim based upon an inadequate warning." [4]

4 *Crislip v. TCH Liquidating Co.* (1990), 52 Ohio St.3d 251, 556 N.E.2d 1177.

[**P7] Ohio has adopted Section 402A of the Second Restatement of Torts regarding strict liability. This section provides, "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused * * *." Thus, for strict liability to be imposed, the product must be defective, and the defect must make the product unreasonably dangerous. A product may be defective because of an inadequate warning even if it contains no design or manufacturing defect. [5] For purposes of the claim against Washington Platform, we only address whether the warning provided was adequate. We reserve our analysis regarding the necessity of a warning for our discussion of the claim against Johnny's.

5 Id. at 1181.

[**P8] R.C. 2307.76 provides the standard for determining when an inadequate warning makes a product defective. The following elements must be shown:

> [**P9] "(1) The manufacturer knew or, in the exercise of reasonable care, should have known about a risk that is associated with the product and that allegedly caused harm for which the claimant seeks to recover compensatory damages; and
>
> [**P10] "(2) The manufacturer failed to provide the warning or instruction that a manufacturer exercising reasonable care would have provided concerning that [*75] risk, in light of the likelihood that the product would cause harm of the type for which the claimant seeks to recover compensatory damages and in light of the likely seriousness of that harm."

[**P11] After extensively reviewing the record, we conclude, as a matter of law, that no liability could have been imposed on Washington Platform for an inadequate warning. Washington Platform's menu contained a warning located directly below all the oyster entrees:

> "Consumer Information: There may be risks associated when consuming shell fish as in the case with other raw protein products. If you suffer from chronic illness of the liver, stomach or blood, or if you are pregnant or if you have other immune disorders, you should eat these products fully cooked."

Appellant alleges that this warning was not adequate because it did not warn of the possibility of death. We disagree. The warning complied with the standard established in R.C. 2307.76. Washington Platform was aware of the dangers associated with the oysters. This was evidenced by the warning present in its menu. We are persuaded that the warning provided was one that a manufacturer exercising reasonable care would have issued. It adequately put a patron on notice of the risks associated with eating raw shellfish, including raw oysters.

[**P12] Other states have found substantially similar warnings to be adequate. Louisiana mandates a warning that contains the language "there may be risks associated with consuming raw shellfish as is the case with other raw protein products. If you suffer from chronic illness of the liver, stomach or blood or have

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other immune disorders, you should eat these products fully cooked." [6] This warning is [***57] nearly identical to the warning provided by Washington Platform; in fact, Washington Platform's warning was slightly more detailed because it included the category of pregnant women, who are excluded in the Louisiana warning.

6 *Vargas v. Continental Cuisine, Inc.* (La.App.2005), 900 So2d 208, 210-211, citing La. Sanitary Code 23:006-4.

[**P13] Texas requires a warning stating that "there is a risk associated with consuming raw oysters or any raw animal protein. If you have chronic illness of the liver, stomach, or blood, or have immune disorders, you are at greatest risk of illness from raw oysters and should eat oysters fully cooked. If unsure of your risk, consult your physician." [7] Washington Platform's warning was substantially similar to this. Both mention stomach, liver, blood, and immune disorders. The main difference between the two warnings is that the Texas warning specifically refers to raw oysters. In our view, this is a distinction without a difference. [*76] Washington Platform instead used the term "shellfish." This was obviously a broader term, but we conclude that a reasonable consumer would have been aware this term included oysters.

7 Tex.Adm.Code 229.164(r).

[**P14] There is one additional fact that is particularly telling. In her deposition, Kimberly Woeste, Woeste's wife, discussed Washington Platform's warning. She stated that if Woeste had in fact read the warning, he would not have eaten the raw oysters. It is difficult to deem the warning inadequate when we are presented with evidence that the warning would have prevented Woeste from eating the oysters. Washington Platform cannot be subjected to liability for Woeste's failure to read the warning provided in the menu. Our reasoning is supported by the Second Restatement of Torts, which provides that "where warning is given, the seller may reasonably assume that it will be read and heeded." [8]

8 Restatement of the Law 2d, Torts (1965), Section 402A, Comment j.

[**P15] Appellant argues that warnings should have been placed in more visible locations throughout the restaurant. While this undoubtedly would have ensured that more people would have seen the warning, it was both unreasonable and impractical. Washington Platform located the warning on its menu next to the food item that necessitated the warning. Considering the totality of the circumstances, including the nature of the restaurant business and the dangers associated with raw shellfish, we hold that the warning was positioned in the most reasonable location.

[**P16] Appellant also alleges that Washington Platform violated Ohio's Pure Food and Drug Law by serving adulterated food. Food is considered adulterated under the following circumstances:

[**P17] "It bears or contains any poisonous or deleterious substance that may render it injurious to health; but in case the substance is not an added substance, the food shall not be considered adulterated if the quantity of the substance in the food does not ordinarily render it injurious to health." [9]

9 R.C. 3715.59(A).

[**P18] Vibrio is not an added substance. It is a naturally occurring bacteria that is taken in as the oysters filter-feed water. Because it is naturally occurring, vibrio cannot adulterate the oysters unless the amount of vibrio present in a particular oyster would ordinarily render it injurious to health. This was not the case here. Vibrio has a minimal effect on the general population. At most, it can cause indigestion [***58] or diarrhea; it is not commonly injurious to health. Vibrio is only deadly to those with weakened immune systems or stomach disorders. Tragically, Woeste fell into the latter category. Because the bacteria does not affect the [*77] great majority of those who eat raw oysters, we conclude that the oysters in this case were not adulterated. [10]

10 See *Fouke & Reynolds v. Great Lakes Terminal Warehouse* (1971), 33 Ohio App.2d 273, 294 N.E.2d 245 (fish containing a large quantity of mercury, a substance natural to the fish, were not adulterated because there was no proof that the quantity of mercury in them was ordinarily injurious to health).

Johnny's

[**P19] Appellant also alleges that genuine issues of material fact exist as to whether Johnny's negligently abused the temperature of the oysters as they were being harvested, whether Johnny's failed to properly warn of the dangers of eating raw oysters, and whether Johnny's violated Ohio's Pure Food and Drug Law by distributing adulterated oysters. We need only discuss the first two issues, as we have already determined, as a matter of law, that the oysters were not adulterated.

[**P20] To succeed on its common-law negligence claim, appellant had to show that Johnny's had a duty not to abuse the temperature of the oysters, that Johnny's breached its duty by abusing the temperature, and that the breach caused the harm Woeste suffered. If the temperature of an oyster is abused, the

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number of vibrio present in the oyster will multiply. Because of the risk associated with oysters containing vibrio, especially an excess amount of vibrio, it is clear that Johnny's did have a duty not to abuse the temperature of the oysters. So we must now determine whether there was evidence to support a finding that the duty was breached.

[**P21] Johnny's did not personally harvest the oysters from the ocean. The harvesting process began when a particular company or agent leased the oyster beds from the state of Texas's General Land Office. Two such companies that Johnny's commonly did business with were "Oysters R Us" and "Shrimps R Us." The record indicates that the particular oysters in question came from a bed leased to an individual agent, Selman Halili. The particular agent or company then directed the Texas Parks and Wildlife Office to issue a permit to Johnny's, and this permit allowed Johnny's to obtain the right to harvest the beds. Johnny's would then hire a vessel to go out and harvest the oyster beds; the hired vessel would receive a copy of Johnny's permit from the Texas Parks and Wildlife Office. Once the hired vessel returned to land with the oysters, Johnny's placed them on a refrigerated truck and transported them to a supplier. If a truck was not immediately available, the sacked oysters were placed in a cooler and refrigerated until a truck arrived. The supplier then shipped the oysters to their final destination, for example a restaurant such as Washington Platform.

[*78] [**P22] We can find no evidence in the record that Johnny's abused the temperature of the oysters during the harvesting process. It is unchallenged that Johnny's was not responsible for any actions taken by workers on the vessels that did the harvesting. These workers were independent contractors, and an employer is generally not liable for the negligent acts of its independent contractors. [11] Furthermore, there is no evidence in the record indicating that the oysters suffered from temperature abuse. Woeste's wife ate from the [***59] same batch of oysters, albeit in a smaller quantity, and suffered no adverse effects. We conclude, as a matter of law, that Johnny's breached no duty regarding the temperature of the oysters.

11 *Pusey v. Bator*, 94 Ohio St.3d 275, 278, 2002 Ohio 795, 762 N.E.2d 968.

[**P23] The final claim of the administratrix related to the warnings provided by Johnny's. Johnny's placed a warning on each sack of oysters it distributed. This warning was substantially similar to the warning provided by Washington Platform, which we have already held was adequate:

> "There is a risk associated with consuming raw oysters or any raw animal protein. If you have chronic illness of the liver, stomach or blood or have immune disorders, you are at great risk of serous illness from raw oysters and should eat oysters fully cooked. If unsure of your risk, consult a physician."

This warning complied with the standards established by R.C. 2307.76. The warning set forth the potential dangers in more detail than the Washington Platform warning. It specifically referred to raw oysters, the food product at issue in this case. It further stated that consumers were "at great risk of serious illness from raw oysters." In our view, the warning was not rendered deficient by its failure to include death as a possible consequence of eating raw oysters. The warning clearly indicated that severe consequences could result, and it placed anyone suffering from a mentioned illness or disorder on notice. It was one that a manufacturer exercising reasonable care would have provided.

[**P24] Johnny's nonetheless contends that it owed no duty to issue a warning because the oysters were not unreasonably dangerous or defective. This issue may be mooted by our determination that the warning actually issued was not legally deficient, but we address it for future guidance.

[**P25] There are two tests to determine whether a food product is defective or adulterated: the foreign-natural test and the reasonable-expectation test. Ohio has not formally adopted either test. Both are summarized in *Matthews v. Maysville Seafoods, Inc.* [12] Under the foreign-natural test, a consumer cannot recover for injuries caused by a substance that is natural to the food eaten. And [*79] under the latter test, the focus is on whether a consumer would reasonably expect to find the substance in the particular food item being ingested. [13]

12 (1991), 76 Ohio App.3d 624, 602 N.E.2d 764.
13 Id. at 625.

[**P26] Raw oysters containing vibrio are not defective or adulterated under either test. We have already stated that vibrio is natural to the oysters. They encounter it in their natural environment and ingest it as they feed. We further hold that one can reasonably expect vibrio to be present in raw oysters. Raw oysters undergo no processing before they are served; rather, consumers receive the oysters in their natural state. [14] "A consumer should expect substances that are indigenous to the organism in its natural state to be present when he or she receives it." [15] Although vibrio does not render the

oysters defective under either of these tests, our analysis as to whether a warning was necessary does not end.

14 *Clime v. Dewey Beach Enterprises, Inc.* (D.1993), 831 F.Supp. 341, 349.
15 Id.

[**P27] A product, though not defective in its present state, may be defective if it contains an unreasonable risk [***60] of harm that could be avoided if accompanied by an adequate warning. [16] Similarly, certain products that are not unreasonably dangerous on their face may become unreasonably dangerous unless accompanied by an adequate warning. [17] Raw oysters containing vibrio are not adulterated or defective; they do, however, pose an unreasonable risk of serious injury or death to people with certain stomach disorders or weakened immune systems. Under these circumstances, a duty to warn of the potential harm caused by vibrio does arise.

16 *Edwards v. Hop Sin, Inc.* (Ky.App.2003), 140 S.W.3d 13, 15.
17 Restatement of the Law 2d, Torts (1965), Section 402A, Comment j.

[**P28] This is not to say that a seller or manufacturer must warn of every possible risk that a food item poses. One need not warn of common risks or allergies. [18] When, however, a seller "has reason to anticipate that [a] danger may result from a particular use * * * he may be required to give adequate warning of the danger." [19] Both Washington Platform and Johnny's were aware that the presence of vibrio in raw oysters could cause serious harm, and both were required to, and did, adequately warn of such risks.

18 Id.
19 Restatement of the Law 2d, Torts (1965), Section 402A, Comment h.

[*80] [**P29] Furthermore, Ohio has since enacted a statutory duty to warn. [20] Because this law did not take effect until after Woeste had passed away, it was not applicable to this case; it does, however, codify the duty to warn for all present and future cases. The statute provides the following:

20 Ohio Adm.Code 3717-1-03.5(E)

[**P30] "(1) * * * if an animal food such as beef, eggs, fish, lamb, milk, pork, poultry, or shellfish is served or sold raw, undercooked, or without otherwise being processed to eliminate pathogens * * * the license holder shall inform consumers of the significantly increased risk of consuming such foods by way of a disclosure and reminder * * *.

[**P31] "(2) Disclosure shall include:

[**P32] "(a) A description of the animal-derived foods, such as oysters on the half-shell (raw oysters) * * *; or

[**P33] "(b) Identification of the animal-derived foods by asterisking them to a footnote that states the items are served raw or undercooked * * *."

[**P34] Ohio clearly requires a duty to warn of the dangers associated with eating raw oysters, and Johnny's arguments to the contrary fail. Fortunately for Johnny's, an adequate warning was issued in this case, and the company faced no liability for failure to adequately warn.

Conclusion

[**P35] After a detailed and thorough review of the record, we conclude that no genuine issue of material fact exists. We affirm the entry of summary judgment for both Washington Platform and Johnny's.

Judgment affirmed.

GORMAN, P.J., and SUNDERMANN, J., concur.

Please Note:

The court has recorded its own entry on the date of the release of this Decision.

SUMMARY:

In an action seeking damages under theories of negligence and products liability, the trial court did not err in granting summary judgment against the estate of a man who had died from the bacteria contained in raw oysters he had eaten at a restaurant, when the bacteria occurred naturally in the oysters in levels that did not cause them to become adulterated, when there was no mishandling of the oysters by the distributor, and when both the distributor and the restaurant, as a matter of law, supplied adequate warnings concerning the dangers posed by consuming the oysters in their raw state.

LEXSEE

ROBERT A. WRIGHT and DEANN K. WRIGHT, Plaintiffs, vs. BROOKE GROUP LIMITED, LIGGETT & MYERS, INC., LIGGETT GROUP, INC., PHILIP MORRIS INCORPORATED (PHILIP MORRIS USA), PHILIP MORRIS COMPANIES, INC., R.J. REYNOLDS TOBACCO COMPANY, and R.J.R. NABISCO, INC., Defendants.

No. 87 / 01-0712

SUPREME COURT OF IOWA

652 N.W.2d 159; 2002 Iowa Sup. LEXIS 202; CCH Prod. Liab. Rep. P16,424; 48 U.C.C. Rep. Serv. 2d (Callaghan) 934

October 9, 2002, Filed

PRIOR HISTORY: [**1] Certified questions of law from the United States District Court for the Northern District of Iowa, Mark W. Bennett, Judge. Certified questions concerning liability of cigarette manufacturers to smoker.

DISPOSITION: CERTIFIED QUESTIONS ANSWERED.

COUNSEL: E. Ralph Walker, David J. Darrell, and Harley C. Erbe of Walker Law Firm, Des Moines, Steven P. Wandro, CeCelia Ibson Wagner, Elizabeth S. Hodgson, and Michelle M. Casper of Wandro, Lyons, Wagner & Baer, P.C., Des Moines, Glenn L. Norris, George F. Davison, Jr., and Carla T. Schemmel of Hawkins & Norris, P.C., Des Moines, and Norwood S. Wilner of Spohrer, Wilner, Maxwell & Matthews, P.A., of Jacksonville, Florida, for plaintiffs.

Robert A. Van Vooren and Thomas D. Waterman of Lane & Waterman, Davenport, and Timothy E. Congrove and J. Patrick Sullivan of Shook, Hardy & Bacon L.L.P., Kansas City, Missouri, for defendant, Philip Morris Incorporated.

Steven L. Nelson and Kris Holub Tilley of Davis, Brown, Koehn, Shors & Roberts, Des Moines, and Robert H. Klonoff, Jeffrey J. Jones and J. Todd Kennard of Jones, Day, Reavis & Pogue, Washington, D.C. and Columbus, Ohio, for defendant, R.J. Reynolds Tobacco Company.

Richard J. Sapp and Michael [**2] W. Thrall of Nyemaster, Goode, Voigts, West, Hansell & O'Brien, P.C., Des Moines, and Kevin M. Reynolds and Richard J. Kirschman of Whitfield & Eddy, P.L.C., Des Moines, for amicus curiae, Iowa Defense Counsel Association and The Defense Research Institute, Inc.

JUDGES: TERNUS, Justice.

OPINION BY: TERNUS

OPINION

[*162] **TERNUS, Justice.**

The United States District Court for the Northern District of Iowa has certified eight questions to this court arising out of a personal injury action filed by a smoker against several cigarette manufacturers. The certified questions address the nature and extent of the manufacturers' liability under products liability, warranty and tort law. In general, our answers can be summarized as follows: (1) in a design defect products liability case, Iowa applies the test set forth in Restatement (Third) of Torts: Product Liability sections 1 and 2 (1998); (2) a civil conspiracy claim may be based on conduct that does not constitute an intentional tort; (3) a product manufacturer's failure to warn or disclose material information will support a fraud claim by a customer only when disclosure is necessary to prevent a prior representation from being misleading; (4) a product [**3] manufacturer's advertisements and statements do not constitute an undertaking so as to create a duty under Restatement (Second) of Torts section 323 (1965); and (5) a cigarette manufacturer has no warranty or tort liability to a smoker based on a manufacturing defect when the cigarettes smoked by the plaintiff were in the condition intended by the manufacturer.

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I. *Factual and Procedural Background.*

The plaintiffs, Robert and DeAnn Wright, filed a petition against the defendants, [*163] all cigarette manufacturers, alleging they had been damaged as a result of Robert's cigarette smoking. (For the sake of simplicity, we will refer only to the plaintiff, Robert Wright, in the remainder of this opinion.) The specific claims made by the plaintiff include (1) negligence, (2) strict liability, (3) breach of implied warranty, (4) breach of express warranty, (5) breach of special assumed duty, (6) fraudulent misrepresentation, (7) fraudulent nondisclosure, and (8) civil conspiracy. The defendants filed a motion to dismiss that was largely overruled by the federal district court. *See* Wright v. Brooke Group Ltd., 114 F. Supp. 2d 797, 838 (N.D. Iowa 2000).

Thereafter, the defendants [**4] asked the federal court to certify questions of law to the Iowa Supreme Court pursuant to Iowa Code section 684A.1 (2001). Concluding the case presented several questions of state law that are potentially determinative and as to which there is either no controlling precedent or the precedent is ambiguous, the district court certified eight questions to this court.

The questions certified are:

1. In a design defect products liability case, what test applies under Iowa law to determine whether cigarettes are unreasonably dangerous? What requirements must be met under the applicable test?

2. Under Iowa law, can Defendants rely on Comment i of § 402A of the Restatement (Second) of Torts to show that cigarettes are not unreasonably dangerous?

3. Under Iowa law, does the common knowledge of the health risks associated with smoking, including addiction, preclude tort and warranty liability of cigarette manufacturers to smokers because cigarettes are not unreasonably dangerous insofar as the risks are commonly known? If yes, then:

a. [During] what period of time would such knowledge be common?

b. Is there a duty to warn of the risks associated with smoking [**5] cigarettes in light of such common knowledge?

c. Is reliance on advertisements, statements or representations suggesting that there are no risks associated with smoking, including addiction, justifiable in light of such common knowledge?

4. Under Iowa law, can Plaintiffs bring a civil conspiracy claim arising out of alleged wrongful conduct that may or may not have been an intentional tort--i.e., strict liability for manufacturing a defective product or intentionally agreeing to produce an unreasonably dangerous product?

5. Under Iowa law, can a manufacturer's alleged failure to warn or to disclose material information give rise to a fraud claim when the relationship between a Plaintiff and a Defendant is solely that of a customer/buyer and manufacturer?

6. Does an "undertaking" arise under § 323 of the Restatement (Second) of Torts, as adopted in Iowa, by reason of a product manufacturer's advertisements or statements directed to its customers?

7. Does Iowa law allow a Plaintiff to recover from a cigarette manufacturer under a manufacturing defect theory when the cigarettes smoked by Plaintiff were in the condition intended by the manufacturer?

8. Does Iowa law allow Plaintiff [**6] to recover from a cigarette manufacturer for breach of implied warranty of merchantability when the cigarettes smoked by Plaintiff were in the condition intended by the manufacturer and Plaintiff alleges [*164] Defendants' cigarettes are "substantially interchangeable"?

We will answer the questions in the order propounded.

II. *In a Design Defect Products Liability Case, What Test Applies Under Iowa Law to Determine Whether Cigarettes Are Unreasonably Dangerous? What Requirements Must Be Met Under the Applicable Test?*

A. *Iowa law governing strict liability for defective products.* The Iowa Supreme Court first applied strict liability in tort for a product defect in 1970, adopting Restatement (Second) of Torts section 402A (1965). *Hawkeye-Sec. Ins. Co. v. Ford Motor Co.*, 174 N.W.2d 672, 684 (Iowa 1970). Section 402A provides:

Special Liability of Seller of Product for Physical Harm to User or Consumer:

(1) one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged [**7] in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Restatement (Second) of Torts § 402A. Our purpose in adopting this provision was to relieve injured plaintiffs of the burden of proving the elements of warranty or negligence theories, thereby insuring "'that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market.'" *Hawkeye-Sec. Ins. Co.*, 174 N.W.2d at 683 (citation omitted).

Consistent with this purpose we held that a plaintiff seeking to recover under a strict liability theory need not prove the manufacturer's negligence. *Id.* at 684. Moreover, we concluded that application of strict liability in tort was not exclusive and did not "'preclude liability based on the alternative ground [**8] of negligence, when negligence could be proved.'" *Id.* at 685 (citation omitted). Although *Hawkeye-Security* was a manufacturing defect case, *id.* at 676-77, our opinion implied that strict liability in tort was applicable to design defects as well, *id.* at 684 (quoting authority that strict liability is applicable when "the defect arose out of the design or manufacture" of the product).

In *Aller v. Rodgers Machinery Manufacturing Co.*, a design defect case, our court discussed in more detail the test to be applied in strict liability cases. *Aller v. Rodgers Machinery Manufacturing Co.*, 268 N.W.2d 830, 832 (Iowa 1978). In that case, the plaintiff asked the court to eliminate the "unreasonably dangerous" element of strict products liability, arguing that to require proof that the product was *unreasonably* dangerous injected considerations of negligence into strict liability, thwarting the purpose of adopting a strict liability theory. *Id.* at 833-34. We rejected the plaintiff's request to eliminate the "unreasonably dangerous" element, concluding the theories of strict liability and negligence were distinguishable:

In strict liability the [**9] plaintiff's proof concerns the condition (dangerous) of a product which is designed or manufactured in a particular way. In negligence the proof concerns the reasonableness of [*165] the manufacturer's conduct in designing and selling the product as he did.

In strict liability the plaintiff takes the design as it was finalized in the finished product and shows it was both dangerous and that it was unreasonable to subject the user to this danger because the user would not contemplate the danger in the normal and innocent use of the product or consumption of the product. In negligence the plaintiff shows the manufacturer was unreasonable in designing the product as he did.

Id. at 835 (citation omitted).

These articulated distinctions were, however, somewhat obscured by this court's explanation of the proof required in a strict liability case. Relying on comment *i* to section 402A, we held that a plaintiff seeking to prove a product was in a "defective condition unreasonably dangerous" must show that the product was "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community [**10] as to its characteristics." *Id.* at 834 (quoting Restatement (Second) of Torts § 402A cmt. *i*). We went on, however, to discuss *how* the plaintiff is to prove the defective condition was unreasonably dangerous:

In order to prove that a product is unreasonably dangerous, the injured plaintiff must prove the product is dangerous and that it was unreasonable for such a danger to exist. Proof of unreasonableness involves a balancing process. On one side of the scale is the utility of the product and on the other is the risk of its use.

Whether the doctrine of negligence or strict liability is being used to impose liability *the same process is going on in*

each instance, i.e., weighing the utility of the article against the risk of its use.

Id. at 835 (emphasis added). Two conclusions can be drawn from our discussion in *Aller*: (1) the legal principles applied in a strict liability case include both a consumer expectation or consumer contemplation test and a risk/benefit or risk/utility analysis; and (2) the risk/benefit analysis employed in a strict liability design defect case is the same weighing process as that used [**11] in a negligence case.

Since *Aller,* this court has varied in its application of the tests set forth in that decision, sometimes applying both tests and sometimes applying only the consumer expectation test. On the other hand, we have continued to equate the strict liability risk/benefit analysis used in a design defect case with that applied in a design negligence case.

In *Chown v. USM Corp.*, 297 N.W.2d 218, 220 (Iowa 1980), a design defect case, we noted that proof of unreasonable danger was an essential element under both strict liability and negligence. We also observed there

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were two tests to determine this element, a consumer expectation test and a risk/benefit analysis. *Chown*, 297 N.W.2d at 220-21. This court then proceeded to apply both tests in deciding the trial court had not erred in ruling that the plaintiff failed to prove the essential element of unreasonable danger. *Id.* at 221. Finding no error, we held the absence of an "unreasonably dangerous" product was fatal to both the plaintiff's design negligence and strict liability design defect claims. *Id.*

In *Fell v. Kewanee Farm Equipment Co.*, 457 N.W.2d 911, 916-18 (Iowa 1990), [**12] this court again applied both the consumer expectation and risk/benefit tests in a strict liability design defect case. *Accord* *Mercer v. Pittway Corp.*, 616 N.W.2d 602, 619-20 (Iowa 2000) (applying both tests). In contrast, some of our cases appear to analyze the element of "unreasonably dangerous" [*166] under the consumer expectation test alone. *See* *Weyerhaeuser Co. v. Thermogas Co.*, 620 N.W.2d 819, 828 (Iowa 2000) (applying consumer expectation test without comment on risk/utility analysis); *Maguire v. Pabst Brewing Co.*, 387 N.W.2d 565, 569-70 (Iowa 1986) (same).

One final development in products liability law in Iowa is worth mentioning before we address the precise issue in this case. In *Olson v. Prosoco*, 522 N.W.2d 284 (Iowa 1994), this court rejected the distinction between negligence and strict liability claims first articulated in *Aller*. *Olson*, 522 N.W.2d at 289. Examining a failure-to-warn case, we abandoned the analysis that differentiated strict liability from negligence on the basis that negligence focuses on the defendant's conduct while strict liability focuses on the condition of the product. [**13] *Id.* We concluded that "inevitably the conduct of the defendant in a failure to warn case becomes the issue," and therefore, the product/conduct distinction had "little practical significance." *Id.* Our acknowledgement that the test for negligence and strict liability were in essence the same led this court to discard the theory of strict liability in failure-to-warn cases and hold that such claims should be submitted under a theory of negligence only. *Id.*

With this abbreviated review of the current status of Iowa product liability law in mind, we turn now to the parties' arguments on the question of the applicable test for determining whether cigarettes are unreasonably dangerous.

B. *Arguments of parties.* The parties disagree as to whether the consumer contemplation test and the risk/benefit analysis are alternative tests or whether both apply in all product defect cases. Assuming the tests are alternative, the parties also differ on which test applies to cigarette cases.

The defendants assert that only the consumer contemplation test of comment *i* to section 402A should be used to determine whether cigarettes are unreasonably dangerous. Their desire for this test [**14] stems from their related argument that common knowledge of the risks of cigarette smoking precludes a finding that cigarettes are dangerous "to an extent beyond that which would be contemplated by the ordinary consumer." Restatement (Second) of Torts § 402A cmt. *i*. The defendants argue that the risk/utility test should not be applied because it was designed for those products, unlike cigarettes, "about which the ordinary consumer would not normally have an expectation of safety or dangerousness."

The plaintiff contends both the consumer contemplation and risk/utility tests apply in design defect cases to determine whether a product is unreasonably dangerous. Alternatively, he suggests this case presents an appropriate opportunity for the court to adopt the principles of law set forth in section 2 of Restatement (Third) of Torts: Product Liability [hereinafter "Products Restatement"]. As a final option, he argues that "since the cigarette companies disputed for decades that their products were dangerous, [cigarettes] would not be products for which consumers would normally have an expectation of safety or dangerousness decades in the past," thus qualifying for the risk/utility [**15] test under the analytical scheme proposed by the defendants.

C. *Discussion*. In determining what test should be applied in assessing whether cigarettes are unreasonably dangerous, we are confronted with the anomaly of using a risk/benefit analysis for purposes of strict liability based on defective design that is identical to the test employed in proving negligence in product [*167] design. *See* *Hillrichs v. Avco Corp.*, 478 N.W.2d 70, 75 (Iowa 1991) (noting, with respect to allegation of enhanced injury due to a design defect, that standards applied in that case "make the strict liability claim depend on virtually the same elements of proof as are required to establish the negligence claim"), *overruled on other grounds by* *Reed v. Chrysler Corp.*, 494 N.W.2d 224, 230 (Iowa 1992). This incongruity has drawn our attention once again to the "debate over whether the distinction between strict liability and negligence theories should be maintained when applied to a design defect case." *Lovick v. Wil-Rich*, 588 N.W.2d 688, 698 (Iowa 1999). We are convinced such a distinction is illusory, just as we found no real difference between strict liability [**16] and negligence principles in failure-to-warn cases. *See* *Olson*, 522 N.W.2d at 289; *Jones v. Hutchinson Mfg., Inc.*, 502 S.W.2d 66, 69-70 (Ky. 1973) (finding no difference between standards of conduct under strict liability and negligence in design defect case: "In either event the standard required is

reasonable care."). *See generally* David Owen, *Products Liability Law Restated*, 49 S.C. L. Rev. 273, 286 (1998) ("It long has been an open secret that, while purporting to apply 'strict' liability doctrine to design and warnings cases, courts in fact have been applying principles that look remarkably like negligence.") [hereinafter "Owen"]. Because the Products Restatement is consistent with our conclusion, we think it sets forth an intellectually sound set of legal principles for product defect cases.

Before we discuss these principles, we first explain our dissatisfaction with the consumer expectation test advocated by the defendants. As one writer has suggested, the consumer expectation test in reality does little to distinguish strict liability from ordinary negligence:

> The consumer expectations test for strict liability operates [**17] effectively when the product defect is a construction or manufacturing defect. . . . An internal standard exists against which to measure the product's condition--the manufacturer's own design standard. In essence, a product flawed in manufacture frustrates the manufacturer's own design objectives. Liability is imposed on manufacturers in these cases even if the manufacturer shows it acted reasonably in making the product. . . .
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> When the claim of defect is based on the product's plan or design, however, the consumer expectations test is inadequate. The test seems to function as a negligence test because a consumer would likely expect the manufacturer to exercise reasonable care in designing the product and using the technology available at that time. . . . Although the consumer expectations test purports to establish the manufacturer's conduct is unimportant, it does not explain what truly converts it into a standard of strict liability.

Keith Miller, *Design Defect Litigation in Iowa: The Myths of Strict Liability,* 40 Drake L. Rev. 465, 473-74 (1991). We agree that the consumer contemplation test is inadequate to differentiate a strict liability design defect [**18] claim from a negligent design case. *Cf.* *Olson*, 522 N.W.2d at 289 (concluding there was no real difference between the tests used in negligent failure to warn and strict liability based on a failure to warn, noting "inevitably the conduct of the defendant . . . becomes the issue"). Consequently, any attempts to distinguish the two theories in the context of a defective design are in vain. That brings us to the Products Restatement, which reflects a similar conclusion by its drafters.

[*168] The Products Restatement demonstrates a recognition that strict liability is appropriate in manufacturing defect cases, but negligence principles are more suitable for other defective product cases. *See* 2 Dan B. Dobbs, *The Law of Torts* § 353, at 977 (2001) ("The effect . . . of the Products Restatement is that strict liability is retained when it comes to product flaws, but negligence or something very much like it is the test of liability when it comes to design and warning defects.") [hereinafter "Dobbs"]; Daniel Givelber, *Cigarette Law*, 73 Ind. L. J. 867, 885 (1998) ("Some thirty years after the Restatement's [(Second) of Torts] apparent embrace of strict [**19] products liability, the dominant rule in American law appears to be that manufacturers are only strictly liable when they make a product different and more dangerous from that intended."). Accordingly, it "establishes separate standards of liability for manufacturing defects, design defects, and defects based on inadequate instructions or warnings." Products Restatement § 2 cmt. *a*, at 14. Initially, section 1 of the Products Restatement provides:

> One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.

Products Restatement § 1, at 5. The "unreasonably dangerous" element of section 402A has been eliminated and has been replaced with a multi-faceted definition of defective product. This definition is set out in section 2:

> A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warning. A product:
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> (a) contains a manufacturing defect when the product departs from its intended design even though all possible care [**20] was exercised in the preparation and marketing of the product;
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> (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
>
> (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.
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> Products Restatement § 2, at 14.

The commentators give the following explanation for the analytical framework adopted in the Products Restatement:

In contrast to manufacturing defects, design defects and defects based on inadequate instructions or warnings are predicated on a different concept of responsibility. In the first place, such defects cannot be determined by reference to the [**21] manufacturer's own design or marketing standards because those standards are the very ones that the plaintiffs attack as unreasonable. Some sort of independent assessment of advantages and disadvantages, to which some attach the label "risk-utility balancing," is necessary. Products are not generically defective merely because they are dangerous. Many product-related accident costs can be eliminated only by excessively sacrificing product features that make products useful and desirable. Thus, the various trade-offs need to be [*169] considered in determining whether accident costs are more fairly and efficiently borne by accident victims, on the one hand, or, on the other hand, by consumers generally through the mechanism of higher product prices attributable to liability costs imposed by the courts on product sellers.

Products Restatement § 2 cmt. *a,* at 15-16. As we noted in *Lovick,* the Products Restatement has essentially "dropped the consumer expectation test traditionally used in the strict liability analysis and adopted a risk-utility analysis traditionally found in the negligence standard." *Lovick*, 588 N.W.2d at 698; *accord* Products Restatement § [**22] 2 cmt. *n*, at 36 ("Regardless of the doctrinal label attached to a particular claim, design and warning claims rest on a risk-utility assessment."); Owen, 49 S.C. L. Rev. at 285-86 ("Thus, the Products Liability Restatement grounds liability for design and warnings defects in the reasonableness-balancing-negligence concepts that properly dominate the law of tort.").

In addition, the Products Restatement does not place a conventional label, such as negligence or strict liability, on design defect cases.

The rules in this Section and in other provisions of this Chapter define the bases of tort liability for harm caused by product defects existing at the time of sale or other distribution. The rules are stated functionally rather than in terms of traditional doctrinal categories. Claims based on product defect at time of sale or other distribution must meet the requisites set forth in Subsection (a), (b), or (c), or the other provisions in this Chapter. As long as these requisites are met, doctrinal tort categories such as negligence or strict liability may be utilized in bringing the claim.

Products Restatement § 2 cmt. *n*, at 34-35. We question the need for [**23] or usefulness of *any* traditional doctrinal label in design defect cases because, as comment *n* points out, a court should not submit both a negligence claim and a strict liability claim based on the same design defect since both claims rest on an identical risk-utility evaluation. *Id.* at 36. Moreover, to persist in using two names for the same claim only continues the dysfunction engendered by section 402A. Therefore, we prefer to label a claim based on a defective product design as a design defect claim without reference to strict liability or negligence.

D. *Conclusion.* In summary, we now adopt Restatement (Third) of Torts: Product Liability sections 1 and 2 for product defect cases. Under these sections, a plaintiff seeking to recover damages on the basis of a design defect must prove "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe." *Id.* § 2(b); *accord* *Hawkeye Bank v. State*, 515 N.W.2d 348, 352 (Iowa 1994) [**24] (requiring "proof of an alternative safer design that is practicable under the circumstances" in negligent design case); *Hillrichs,* 478 N.W.2d at 75 (requiring "proof of an alternative safer design" under a theory of enhanced injury caused by a design defect).

III. *Under Iowa Law, Can Defendants Rely on Comment i of § 402A of the Restatement (Second) of Torts to Show That Cigarettes Are Not Unreasonably Dangerous?*

Comment *i* of section 402A addresses the "unreasonably dangerous" element of strict liability and sets forth the [*170] consumer contemplation test considered above. It discusses the necessity of proof that the product is dangerous "to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Restatement (Second) of Torts § 402A cmt. *i*, at 352. In the course of this discussion, the comment states: "Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful . . . ." Relying on this statement, the defendants assert "design defect claims involving cigarettes fail as a matter of law because cigarettes [**25] are not unreasonably dangerous under comment *i*."

Because we have abandoned section 402A and the requirement of unreasonably dangerous, comment *i* does not apply to the case before us. Therefore, the defendants

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cannot rely on the statement made in comment *i* pertaining to tobacco.

IV. *Under Iowa Law, Does the Common Knowledge of the Health Risks Associated With Smoking, Including Addiction, Preclude Tort and Warranty Liability of Cigarette Manufacturers to Smokers Because Cigarettes Are Not Unreasonably Dangerous Insofar as the Risks Are Commonly Known?*[1]

> 1 *The third certified question also contains three subparts:*
>
> *a. [During] what period of time would such knowledge be common?*
>
> *b. Is there a duty to warn of the risks associated with smoking cigarettes in light of such common knowledge?*
>
> *c. Is reliance on advertisements, statements or representations suggesting that there are no risks associated with smoking, including addiction, justifiable in light of such common knowledge?*
>
> We decline to answer these questions because they are questions of fact or require factual determinations that are not within the reach of chapter 684A. See Iowa Code § 684A.1 ("The supreme court may answer *questions of law* certified to it . . . ." (Emphasis added.)). The common knowledge of consumers during the lengthy time period at issue in this case is a factual issue beyond the scope of this certified-question proceeding.

[**26] Our initial answer to this question is that our adoption of sections 1 and 2 of the Products Restatement renders unnecessary any examination of the unreasonable dangerousness of cigarettes as that test is used in section 402A. Moreover, "consumer expectations do not constitute an independent standard for judging the defectiveness of product designs" under section 2. *See* Products Restatement § 2 cmt. *g*, at 27. Therefore, the common knowledge of consumers of the health risks associated with smoking does not necessarily preclude liability.

Although consumer expectations are not the sole focus in evaluating the defectiveness of a product under the Products Restatement, consumer expectations remain relevant in design defect cases. Comment *g* to section 2 states:

Consumer expectations about product performance and the dangers attendant to product use affect how risks are perceived and relate to forseeability and frequency of the risks of harm, both of which are relevant under Subsection (b). See Comment *f*. Such expectations are often influenced by how products are portrayed and marketed and can have a significant impact on consumer behavior. Thus, although consumer expectations [**27] do not constitute an independent standard for judging the defectiveness of product designs, they may substantially influence or even be ultimately determinative on risk-utility balancing in judging [*171] whether the omission of a proposed alternative design renders the product not reasonably safe.

Subsection (b) likewise rejects conformance to consumer expectations as a defense. *The mere fact that a risk presented by a product design is open and obvious, or generally known, and that the product thus satisfies expectations, does not prevent a finding that the design is defective.* But the fact that a product design meets consumer expectations may substantially influence or even be ultimately determinative on risk-utility balancing in judging whether the omission of a proposed alternative design renders the product not reasonably safe. It follows that, while disappointment of consumer expectations may not serve as an independent basis for allowing recovery under Subsection (b), neither may conformance with consumer expectations serve as an independent basis for denying recovery. Such expectations may be relevant in both contexts, but in neither are they controlling.

Id. § 2 cmt. [**28] *g*, at 27-28 (emphasis added). Thus, while consumer expectations are generally not determinative in a design defect case, they are one factor to be considered in deciding "whether an alternative design is reasonable and whether its omission renders a product not reasonably safe." *Id.* § 2 cmt. *f*, at 23.

Consumer knowledge also remains relevant to failure-to-warn claims.

In general, a product seller is not subject to liability for failing to warn or instruct regarding risks and risk-avoidance measures that should be obvious to, or generally known by, foreseeable product users. When a risk is obvious or generally known, the prospective addressee of a warning will or should already know of its existence. Warning of an obvious or generally known risk in most instances will not provide an effective additional measure of safety. Furthermore, warnings that deal with obvious or generally known risks may be ignored by users and consumers and may diminish the significance of warnings about non-obvious, not-generally-known risks. Thus, requiring warnings of obvious or generally known risks could reduce the efficacy of warnings generally. When reasonable minds may differ as to whether [**29] the risk was obvious or generally known, the issue is to be decided by the trier of fact.

Id. § 2 cmt. *j*, at 31.

In summary, consumer knowledge is merely one factor in assessing liability for design defects or for failure to warn of product risks. We cannot say at this stage of the proceedings prior to any factual determination of the common knowledge of consumers during the relevant time frame whether such knowledge would, as a matter of law, preclude liability under the principles set forth in the Products Restatement.

V. *Under Iowa Law, Can Plaintiffs Bring a Civil Conspiracy Claim Arising Out of Alleged Wrongful Conduct That May or May Not Have Been an Intentional Tort--i.e., Strict Liability for Manufacturing a Defective Product or Intentionally Agreeing to Produce an Unreasonably Dangerous Product?*

Under Iowa law, "[a] conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish by unlawful means some purpose not in itself unlawful." *Basic Chems., Inc. v. Benson*, 251 N.W.2d 220, 232 (Iowa 1977). Our court has also relied on the principles stated in the Restatement (Second) of [**30] Torts section 876 to set the parameters of this claim:

[*172] Under the Restatement, a person becomes subject to liability for harm caused by the *tortious* conduct of another when that person: (a) does a *tortious* act in concert with the other or pursuant to a common design with the other (traditional conspiracy) . . . .

Ezzone v. Riccardi, 525 N.W.2d 388, 398 (Iowa 1994) (emphasis added) (citing Restatement (Second) of Torts § 876, at 315 (1979)). Under this theory of liability, "an agreement must exist between the two persons to commit *a wrong* against another." *Id.* (emphasis added).

"Civil conspiracy is not in itself actionable; rather it is the acts causing injury undertaken in furtherance of the conspiracy [that] give rise to the action." *Basic Chems.*, 251 N.W.2d at 233; *accord Adam v. Mt. Pleasant Bank & Trust Co.*, 387 N.W.2d 771, 773 (Iowa 1986). Thus, conspiracy is merely an avenue for imposing vicarious liability on a party for the wrongful conduct of another with whom the party has acted in concert. *See John's Insulation, Inc. v. Siska Constr. Co.*, 774 F. Supp. 156, 162 (S.D.N.Y. 1991) [**31] ("Allegations of a civil conspiracy, therefore, are proper only for the purpose of establishing joint liability by co-participants in tortious conduct."); 2 Dobbs § 340, at 936-37 (characterizing cases applying a civil conspiracy theory as employing a model of vicarious liability). Thus, the wrongful conduct taken by a co-conspirator must itself be actionable. *See John's Insulation, Inc.*, 774 F. Supp. at 161 ("A claimant must plead specific wrongful acts which constitute an independent tort."); *Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs., Inc.*, 88 Md. App. 672, 596 A.2d 687, 700 (Md. Ct. Spec. App. 1991) ("The act (or means) need only be 'of such a character as to create an actionable wrong.'" (citation omitted)); 16 Am. Jur. 2d *Conspiracy* § 50, at 275-76 (1998) ("If the acts alleged to constitute the underlying wrong provide no cause of action, then neither is there a cause of action for the conspiracy itself.").

Although our cases applying a civil conspiracy theory involve agreements to commit an intentional tort, *e.g.*, *Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 768 (Iowa 1999) (interference [**32] with contract); *Ezzone*, 525 N.W.2d at 392 (interference with contract); *Adam*, 387 N.W.2d at 775 (fraud); *Basic Chems.*, 251 N.W.2d at 232 (unfair competition), our court has never held that a claim of civil conspiracy must be based on such an agreement. Moreover, our reliance on section 876 of the Restatement would seem to indicate an inclination to apply civil conspiracy whenever the underlying conduct was simply tortious. Although the Restatement (Second) of Torts takes no position on whether section 876 applies when the actor's conduct involves strict liability, [2] the comments to section 876 state "it is essential that the conduct of the actor be itself *tortious*." *See* Restatement (Second) of Torts § 876 cmt. *c*, at 316 (emphasis added); *accord* 2 Dobbs § 340, at 936 ("Conspiracy is not a tort in itself; it reflects the conclusion that each participant should be liable for the *tortious* course of conduct." (Emphasis added.)). In addition, the comments include an illustration predicated on conduct that does not necessarily include an intent to do harm. *See* Restatement (Second) of Torts § 876 cmt. *a* [**33] , illus. 1, at 316 (setting forth example involving co-conspirators who were racing on public highway).

2 Because we have abandoned strict liability as a basis for design defect cases and failure-to-warn cases and because we conclude, as we later discuss, that the present case does not present an actionable manufacturing defect claim, we need not determine whether a civil conspiracy claim can be based on conduct that subjects the actor to liability under a strict liability theory.

[*173] Notwithstanding the lack of support in general legal authorities for a requirement that the tortious conduct of the actor be intentional, some jurisdictions require that a civil conspiracy claim be based on an intentional tort, not simple negligence. *E.g.*, *Sonnenreich v. Philip Morris Inc.*, 929 F. Supp. 416, 419 (S.D. Fla. 1996); *Campbell v. A.H. Robins Co.*, 615 F. Supp. 496, 500 (W.D. Wis. 1985); *Altman v. Fortune Brands, Inc.*, 268 A.D.2d 231, 701 N.Y.S.2d 615, 615

(App. Div. 2000); [**34] *N. Am. Van Lines, Inc. v. Emmons*, 50 S.W.3d 103, 116 (Tex. App. 2001); *accord* 16 Am. Jur. 2d *Conspiracy* § 51, at 278 (1998). These authorities suggest that since civil conspiracy is an intentional tort, it is illogical to conclude that persons can conspire to commit negligence. *E.g.*, *Sonnenreich*, 929 F. Supp. at 419; *Campbell*, 615 F. Supp. at 497. We think this reasoning is faulty.

In *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 645 N.E.2d 888, 206 Ill. Dec. 636 (Ill. 1995), the plaintiff sued his former employer and its successor, alleging that his employer, a manufacturer of asbestos, conspired with other manufacturers to suppress information about the hazards of asbestos exposure. 645 N.E.2d at 891-92. In rejecting the defendant's argument that an action for civil conspiracy does not arise unless one of the conspirators commits an intentional tort in furtherance of the conspiracy, the court stated:

While a civil conspiracy is based upon intentional activity, the element of intent is satisfied when a defendant knowingly and voluntarily participates in a common scheme to commit an unlawful [**35] act or a lawful act in an unlawful manner. There is no such thing as accidental, inadvertent or negligent participation in a conspiracy. A defendant who innocently performs an act which happens to fortuitously further the tortious purpose of another is not liable under the theory of civil conspiracy. A defendant who understands the general objectives of the conspiratorial scheme, accepts them, and agrees . . . to do its part to further those objectives, however, is liable as a conspirator. Once a defendant knowingly agrees with another to commit an unlawful act or a lawful act in an unlawful manner, that defendant may be held liable for any tortious act committed in furtherance of the conspiracy, whether such tortious act is intentional or negligent in nature.

645 N.E.2d at 894-95 (citations omitted).

We disagree with those courts that conclude an agreement to be negligent is a non sequitur. For example, the plaintiff in *Adcock* alleged "asbestos manufacturers engaged in an industrywide conspiracy to conceal and affirmatively misstate the hazards associated with asbestos exposure" and "performed tortious acts in furtherance of the conspiracy." 645 N.E.2d at 895. There is nothing [**36] illogical or nonsensical about this scenario: manufacturers agree to suppress information about their product for the lawful purpose of facilitating the sale of their product, and in effectuating this plan subject themselves to liability for failure to warn of the risks of using their product. So long as the underlying actionable conduct is of the type that one can plan ahead to do, it should not matter that the legal system allows recovery upon a mere showing of unreasonableness (negligence) rather than requiring an intent to harm.

Amicus curiae argue that to adopt this position will greatly extend the reach of civil conspiracy claims in the area of products liability. They contend that under this theory "every company that belongs to a trade association, industry group, or product advisory group would face conspiracy charges predicated on nothing more than the fact that it manufactured a product that had characteristics of those within that industry." Under the [*174] principles announced today, however, we do not think liability could properly be imposed under the facts suggested by amicus curiae. Liability for civil conspiracy requires an agreement between the actor and the party sought [**37] to be held liable. *See* *Ezzone*, 525 N.W.2d at 398; Restatement (Second) of Torts § 876 cmt. *a*, at 316. An agreement sufficient to impose liability results only from a defendant's knowing and voluntary participation in a common scheme to take action, lawful or unlawful, that ultimately subjects the actor to liability to another. *See* 16 Am. Jur. 2d *Conspiracy* § 51, at 276 (stating there must be "a meeting of the minds"); *see also* *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 720 N.E.2d 242, 259, 241 Ill. Dec. 787 (Ill. 1999) ("Parallel conduct may serve as circumstantial evidence of a civil conspiracy among manufacturers of the same or similar products but is insufficient proof, by itself, of the agreement element of this tort."). Consequently, a company's mere membership in an industry group would not make that company liable for the tortious acts of other members of the group.

In summary, the plaintiff may base a claim of civil conspiracy on wrongful conduct that does not constitute an intentional tort. Such underlying acts must, however, be actionable in the absence of the conspiracy.

VI. *Under Iowa Law, Can a Manufacturer's* [**38] *Alleged Failure to Warn or to Disclose Material Information Give Rise to a Fraud Claim When the Relationship Between a Plaintiff and a Defendant Is Solely That of a Customer/Buyer and Manufacturer?* [3]

3 *In responding to this question, we interpret the inquiry to be focused on liability for nondisclosure as opposed to liability for affirmative misrepresentations.*

Under Iowa law, the failure to disclose material information can constitute fraud if the concealment is made "by a party under a duty to communicate the concealed fact." *Cornell v. Wunschel*, 408 N.W.2d 369, 374 (Iowa 1987); *see also* Restatement (Second) of Torts § 557A, at 149 (1977) (stating that the tort of fraud may serve as a basis for the recovery of damages for physical

harm to the person or property of one who justifiably relies on the defendant's "fraudulent . . . nondisclosure of a fact *that it is [the defendant's] duty to disclose*" (emphasis added)). The issue presented by the certified question is whether a manufacturer [**39] has a duty to communicate "material information" to the ultimate user of the manufacturer's product.

In the past, this court has recognized a duty to disclose in situations where the plaintiff and the defendant were involved in some type of business transaction, such as buyer/seller or owner/contractor. *See* Clark v. McDaniel, 546 N.W.2d 590, 592-93 (Iowa 1996) (buyer and seller of used vehicle); Cornell, 408 N.W.2d at 376 (defendant represented wife in sale of hotel to the plaintiff); Kunkle Water & Elec., Inc. v. City of Prescott, 347 N.W.2d 648, 653-54 (Iowa 1984) (defendant to counterclaim contracted with counterclaim plaintiff to repair counterclaim plaintiff's water system). In such circumstances, we have held that an actionable misrepresentation may occur "when one with superior knowledge, *dealing with* inexperienced persons who rely on him or her, purposely suppresses the truth respecting a material fact involved in the transaction." Kunkle Water & Elec., 347 N.W.2d at 653 (emphasis added); *accord* Cornell, 408 N.W.2d at 376. This principle is consistent with the Restatement's imposition [**40] of a duty to disclose [*175] facts basic to the transaction, if [the defendant] knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Restatement (Second) of Torts § 551(2)(e), at 119.

This court has also held that a duty to disclose may arise from the "attendant circumstances," such as a "'contrivance intended to exclude suspicion and prevent inquiry.'" Wilden Clinic, Inc. v. City of Des Moines, 229 N.W.2d 286, 293 (Iowa 1975) (quoting 37 Am. Jur. 2d *Fraud and Deceit* § 145 (1968)) (involving dispute between buyer and seller of land). This position is in accord with the Restatement (Second) of Torts, which provides:

One party *to a business transaction* is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

. . .

(B) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading . . . .

Restatement (Second) of Torts § 551(2)(b) (emphasis [**41] added); *accord* *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 7 F. Supp. 2d 277, 290-91 (S.D.N.Y. 1998); 2 Dobbs § 481, at 1375 (stating that an "affirmative duty of disclosure [is] imposed when . . . the defendant has communicated a half-truth, that is, a partial or ambiguous statement that is misleading unless additional facts are disclosed"). A similar factual situation giving rise to a duty to disclose occurs when a party acquires information "that he knows will make untrue or misleading a previous representation that when made was true or believed to be so." Restatement (Second) of Torts § 551(2)(c). A party must use reasonable care to disclose such subsequently acquired information to another party who has relied on the prior representation. *Id.*; Glassner v. R.J. Reynolds Tobacco Co., 223 F.3d 343, 352 (6th Cir. 2000); Jones v. Am. Tobacco Co., 17 F. Supp. 2d 706, 719 (N.D. Ohio 1998).

Whether a manufacturer owes a duty to disclose material information to a consumer turns, we think, on two issues: (1) is the nature of the relationship between a consumer and a manufacturer of the type to which such a [**42] duty should attach even in the absence of any direct dealing between the parties; and (2) does the duty of a manufacturer to a consumer encompass a general duty "to warn or to disclose material information" or is it limited to a duty to correct misleading statements made by the manufacturer? For reasons that follow, we conclude a manufacturer has a duty to a consumer under Restatement (Second) of Torts section 551(2)(b) to disclose "matters known to [the manufacturer] that [it] knows to be necessary to prevent [its] partial or ambiguous statement of the facts from being misleading" and under section 551(2)(c) to disclose subsequently acquired information that would prevent a prior statement from being false or misleading.

Iowa cases applying a fraud theory have typically involved a business transaction between the parties, a fact not present in the certified question submitted here. Generally there is no "dealing" between a manufacturer and the ultimate consumer of the manufacturer's product. Thus, the communication *between* two parties giving rise to one party's reliance on the other to disclose facts material to the first party's decision to enter into the transaction is [**43] lacking. *See* Moore v. Fenex, Inc., 809 F.2d 297, 303 n.2 (6th Cir. 1987) ("We are aware of no case, nor has any been cited, [*176] where a party has been liable for fraudulent nondisclosure that had no direct dealings with the plaintiff."). *But see* Clark v. McDaniel, 546 N.W.2d 590, 592-94 (Iowa 1996) (holding used-car dealer liable to subsequent purchaser for fraudulent nondisclosure pursuant to Restatement (Second) of Torts § 533 (1977), which extends liability to third parties whom the defendant has reason to expect will hear and rely on misinformation).

On the other hand, there is support in Iowa case law for the conclusion that the intentional tort of fraud is not necessarily limited to parties dealing directly with each other. In *Markworth v. State Savings Bank,* 212 Iowa 954, 237 N.W. 471 (1931), this court noted that an action for fraud "can only be brought by the one to whom the fraudulent representations were made." 212 Iowa at 960, 237 N.W. at 474. In explaining this limitation, however, the court quoted "approvingly" from a noted treatise on torts that belied such a narrow application of the tort:

"No one has a [**44] right to accept and rely upon the representations of others but those to influence whose action they were made. * * * When statements are made for the express purpose of influencing the action of another, it is to be assumed they are made deliberately, and after due inquiry, and it is no hardship to hold the party making them to their truth. But he is morally accountable to no person whomsoever but the very person he seeks to influence."

Id. at 960-61, 237 N.W. at 474 (citation omitted). We conclude from this discussion that what is really important is that the statements were made for the purpose of influencing the action of another. The fact that this element is usually found in transactions where the parties deal directly with one another does not mean that the same goal of influencing another's action cannot be present in business transactions that do not involve direct contact between the plaintiff and the defendant. *See Small v. Lorillard Tobacco Co.*, 176 Misc. 2d 413, 672 N.Y.S.2d 601, 611 (Sup. Ct. 1997) (holding that manufacturer could be held liable for fraud where the misrepresentations were "made to the public at large for the purpose [**45] of influencing the action of anyone who may act upon those representations"); *Williams v. Philip Morris Inc.*, 182 Ore. App. 44, 48 P.3d 824, 832 (Or. Ct. App. 2002) (holding that smoker was required to prove he was "within a class of people whom defendant [cigarette manufacturer] intended to be recipients of and to rely on the [misleading statements]"). We hold, therefore, that a manufacturer who makes statements for the purpose of influencing the purchasing decisions of consumers has a duty to disclose sufficient information so as to prevent the statements made from being misleading, as well as a duty to reveal subsequently acquired information that prevents a prior statement, true when made, from being misleading.

We decline to extend the duty of disclosure in this context to a general duty to warn, or a duty to disclose under Restatement section 551(2)(e). *See Estate of White ex rel. White v. R. J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 431 (D. Md. 2000) (refusing to impose duty to disclose based on mere relationship of manufacturer and buyer); *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 675 N.E.2d 584, 593, 221 Ill. Dec. 389 (Ill. 1996) [**46] (same). *See generally* Restatement (Second) of Torts § 551(2)(e) (imposing a duty to disclose "facts basic to the transaction" when such disclosure would be expected based on the nature of the transaction). Principles of products liability law define the duties of disclosure owed by a manufacturer to a consumer arising out of their relationship as such.

[*177] In summary, a manufacturer's failure to warn or to disclose material information does not give rise to a fraud claim when the relationship between a plaintiff and a defendant is solely that of a customer/buyer and manufacturer with two exceptions. Those exceptions are limited to instances where the manufacturer (1) has made misleading statements of fact intended to influence consumers, or (2) has made true statements of fact designed to influence consumers and subsequently acquires information rendering the prior statements untrue or misleading. *See* Restatement (Second) of Torts § 551(2)(b), (c). Under these circumstances, a manufacturer's failure to disclose material information that would prevent his statement of the facts from being misleading can give rise to a fraud claim. [4]

4 We express no opinion on whether such claims would be preempted by the Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 527-30,112 S. Ct. 2608, 2623-24, 120 L. Ed. 2d 407, 429-31 (1992); *Burton v. R.J. Reynolds Tobacco Co.*, 208 F. Supp. 2d 1187, 1206 (D. Kan. 2002); *Cantley v. Lorillard Tobacco Co.*, 681 So. 2d 1057, 1061 (Ala. 1996); *Laschke v. Brown & Williamson Tobacco Corp.*, 766 So. 2d 1076, 1078 (Fla. Dist. Ct. App. 2000); *Small v. Lorillard Tobacco Co.*, 252 A.D.2d 1, 679 N.Y.S.2d 593, 603-04 (App. Div. 1998); *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 439, 40 Tex. Sup. Ct. J. 658-40 (Tex. 1997).

[**47] VII. *Does an "Undertaking" Arise Under § 323 of the Restatement (Second) of Torts, as Adopted in Iowa, by Reason of a Product Manufacturer's Advertisements or Statements Directed to Its Customers?*

Restatement (Second) of Torts section 323 has been characterized as defining the liability of a "good samaritan." *See, e.g.*, *Good v. Ohio Edison Co.*, 149 F.3d 413, 420 (6th Cir. 1998); *Gunsalus v. Celotex Corp.*, 674 F. Supp. 1149, 1157 (E.D. Pa. 1987). It provides:

One who undertakes, gratuitously or for consideration, to render services to another which he

should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323; *see also Jain v. State*, 617 N.W.2d 293, 299-300 (Iowa 2000) (discussing requirements for claim made under section 323).

Preliminarily, it seems [**48] obvious from the text of this provision that not every statement made by a manufacturer, whether in an advertisement or otherwise, could constitute an undertaking under section 323. Only when the advertisement or statement indicates that the manufacturer intends to render *services to another* that are necessary for *the other's* protection is liability under section 323 even possible. Thus, we agree with the United States Court of Appeals for the Third Circuit that a manufacturer's mere marketing of its product does not constitute an "undertaking to inform the public about the known risks of its products." *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 936 (3d Cir. 1999).

Even though our discussion could end here, we assume, based on the allegations in the petition, that the certified question contemplates the advertisement or statement made by the product manufacturer is something more than mere marketing. Thus, we will proceed with the understanding that the advertisement or statement [*178] this court is asked to consider is one similar to that alleged by the plaintiff in his petition. Here, the plaintiff alleges that the defendants [**49] promised to "report honestly and competently on all research regarding smoking and health regarding their tobacco products through their public pronouncements."

We do not think the defendants' statements that they would report on the results of their research into the health effects of cigarette smoking was an undertaking to render a service to its customers. As one court has concluded in rejecting section 323 liability based on similar statements by tobacco companies, the defendants, by making these statements, did not undertake "to do anything specific for any particular person or entity." *Ky. Laborers Dist. Council Health & Welfare Trust Fund v. Hill & Knowlton, Inc.*, 24 F. Supp. 2d 755, 774 (W.D. Ky. 1998) (considering manufacturers' public expression of "interest in the public health" and pledge of "resources to assist the scientific and public health communities with tobacco research"). Other courts are in accord with this result. *See Serv. Employees Int'l Union Health & Welfare Fund v. Philip Morris, Inc.*, 83 F. Supp. 2d 70, 93 (D.D.C. 1999), *rev'd on other grounds*, 346 U.S. App. D.C. 74, 249 F.3d 1068 (D.C. Cir. 2001) (rejecting section 323 liability [**50] based on similar statements made by cigarette manufacturers to the general public, ruling such statements "must be made directly to the [smoker], not to the general public through advertisements"); *Ark. Carpenters' Health & Welfare Fund v. Philip Morris Inc.*, 75 F. Supp. 2d 936, 944 (E.D. Ark. 1999) (holding that similar statements by cigarette manufacturer were insufficient to support liability under section 323); *Mass. Laborers' Health & Welfare Fund v. Philip Morris, Inc.*, 62 F. Supp. 2d 236, 245-46 (D. Mass. 1999) (dismissing section 323 claim brought by employee health benefit plan to recover expenses it paid for its participants' smoking-related health care, stating "the 'relationship' between sellers of a product and purchasers of that product" is not an appropriate basis for section 323 liability); *Gunsalus*, 674 F. Supp. at 1157 (granting summary judgment on section 323 claim, stating tobacco company's public pledge of "aid and assistance to the research effort into all phases of tobacco use and health" did not "constitute an assumption of a duty to [individual smokers] to perform research and inform [them] of all dangers [**51] of cigarette smoking"). We conclude statements by manufacturers such as those alleged in the plaintiff's petition are not an "undertaking" within the scope of section 323.

VIII. *Does Iowa Law Allow a Plaintiff to Recover From a Cigarette Manufacturer Under a Manufacturing Defect Theory When the Cigarettes Smoked by Plaintiff Were in the Condition Intended by the Manufacturer?*

Under the principles set forth in the Products Restatement adopted today, "[a] product is defective when, at the time of sale or distribution, it contains a manufacturing defect . . . ." Products Restatement § 2. A product "contains a manufacturing defect *when the product departs from its intended design* even though all possible care was exercised in the preparation and marketing of the product." *Id.* § 2(a) (emphasis added). Clearly, then, under Iowa law, a plaintiff may not recover from a cigarette manufacturer under a manufacturing defect theory when the cigarettes smoked by the plaintiff were in the condition intended by the manufacturer.

Although the answer to the certified question is clear under the law set out in the Products Restatement, many courts have reached the same conclusion in [**52] applying the principles of Restatement (Second) of Torts. *See, e.g., Wheeler v. Ho Sports, Inc.*, 232 F.3d 754, 757

(10th Cir. 2000) ("A [*179] product is defective in manufacture if it 'deviates in some material way from its design or performance standards. The issue is whether the product was rendered unsafe by an error in the manufacturing process.' Errors in process are often established by showing that a product, as produced, failed to conform with the manufacturer's specifications." (Citations omitted.)); *In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 97 F.3d 1050, 1055 n.4 (8th Cir. 1996) ("'A manufacturing defect exists only where an item is substandard when compared to other identical units off of the assembly line.'"); *Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F. Supp. 2d 263, 280 (D.R.I. 2000) ("To establish a manufacturing defect, 'a plaintiff must show a product defect caused by a mistake or accident in the manufacturing process.'" (Citation omitted.)); *Stoffel v. Thermogas Co.*, 998 F. Supp. 1021, 1033 (N.D. Iowa 1997) ("'A manufacturing defect . . . results when a mistake in manufacturing [**53] renders a product that is ordinarily safe dangerous so that it causes harm.'" (Citation omitted.)) (applying Iowa law); 2 Dobbs § 362, at 1002 ("The plaintiff may show a [manufacturing] defect by direct evidence that points to the defect and identifies it as a departure from the defendant's intended design.").

IX. *Does Iowa Law Allow Plaintiff to Recover From a Cigarette Manufacturer for Breach of Implied Warranty of Merchantability When the Cigarettes Smoked by Plaintiff Were in the Condition Intended by the Manufacturer and Plaintiff Alleges Defendants' Cigarettes Are "Substantially Interchangeable"?*

Because the implied warranty of merchantability is statutory, we begin our discussion of this issue with a reference to the governing act:

> 1. Unless excluded or modified (section 554.2316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .
>
> 2. Goods to be merchantable must be at least such as
>
> *a.* pass without objection in the trade under the contract description; and
>
> *b.* in the case of fungible goods, are of fair average quality within the description; [**54] and
>
> *c.* are fit for the ordinary purposes for which such goods are used; and
>
> *d.* run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
>
> *e.* are adequately contained, packaged, and labeled as the agreement may require; and
>
> *f.* conform to the promises or affirmations of fact made on the container or label if any.
>
> Iowa Code § 554.2314 (1999).

The plaintiff claims the cigarettes sold by the defendants were not "fit for the ordinary purposes for which such goods are used" because the cigarettes were carcinogenic and addictive. *See id.* § 554.2314(2)(*c*)[5]

[5]. He argues that a design defect could infect an entire product line, thereby rendering the product unmerchantable, even though the product is in the condition intended by the manufacturer and conforms to similar products.

> 5 Because the plaintiff's claim rests on subsection (2)(*c*), our discussion of the implied warranty of merchantability has reference only to a warranty claim premised on an allegation that the product was not "fit for the ordinary purposes for which such goods are used." Iowa Code § 554.2314(2)(*c*).

[**55] [*180] The defendants assert that "when a product is manufactured as intended and is like other products of that type, there is no breach of the implied warranty of merchantability." If a health risk associated with use of a product renders the product unmerchantable, contend the defendants, then warranty claims could be brought against manufacturers "of butter, meat, and alcohol, not to mention bicycles, ladders, and knives, precisely because they all carry a risk of disease or injury."

In reviewing case law from other jurisdictions, we find support for both views. Courts have held that a product that is unreasonably dangerous or lacks adequate warning is likewise not fit for ordinary use. *E.g.*, *Hill v. Searle Labs.*, 884 F.2d 1064, 1070 n.10 (8th Cir. 1989) ("Inadequate warning can be evidence of a breach of warranty on the part of a manufacturer."); *Bly v. Otis Elevator Co.*, 713 F.2d 1040, 1045 (4th Cir. 1983) ("A manufacturer may breach its implied warranty of merchantability by failing to warn or instruct concerning dangerous propensities or characteristics of a product even if that product is flawless in design and manufacture."); *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 296, 297 n.14 (3d Cir. 1961) [**56] (reversing dismissal of claim for breach of implied warranty of merchantability based on allegation that cigarettes were unfit because they caused physical injury to the smoker, notwithstanding lack of allegation that the cigarettes "smoked by plaintiff were not of the same quality as those generally sold"); *Kyte v. Philip Morris Inc.*, 408 Mass. 162, 556 N.E.2d 1025, 1029 (Mass. 1990) (denying summary judgment on plaintiff's breach of implied warranty claim based upon an alleged design

defect, not in all cigarettes, but in Marlboro and Parliament cigarettes in particular that made those cigarettes "inherently carcinogenic and addictive"). In contrast, other courts have rejected the argument that an unreasonably dangerous product for purposes of strict liability is per se unmerchantable. *E.g.*, *Spain v. Brown & Williamson Tobacco Corp.*, 230 F.3d 1300, 1310 (11th Cir. 2000) (ruling that complaint alleging that cigarettes "were unfit for the ordinary purpose for which they are used because they caused cancer, making them unreasonably dangerous" did not state a claim for breach of an implied warranty of merchantability"); *Green v. Am. Tobacco Co.*, 409 F.2d 1166, 1166 (5th Cir. 1969) [**57] (affirming judgment for cigarette manufacturer on breach of implied warranty claim, holding that warranty was not breached where there was no proof that cigarettes were adulterated); *Tompkins v. R.J. Reynolds Tobacco Co.*, 92 F. Supp. 2d 70, 94 (N.D.N.Y. 2000) (dismissing implied warranty claim based on allegation that all cigarettes are carcinogenic, noting that "warranty of fitness for ordinary purposes 'provides for a minimal level of quality'" (citation omitted)); *Ark. Carpenters' Health & Welfare Fund*, 75 F. Supp. 2d at 945 (holding plaintiff had failed to state a claim for breach of the implied warranty of merchantability based on allegation that "a typical cigarette, like all cigarettes, is 'generally defective'"); *Shell v. Union Oil Co.*, 489 So. 2d 569, 571-72 (Ala. 1986).

Although this court has not addressed the precise issue presented in the certified question, we think the answer lies in the interrelationship of warranty claims and tort product-defect claims, an issue we have considered. Almost twenty years ago, we observed that a warranty of merchantability "is based on a purchaser's reasonable [*181] expectation that goods . [**58] . . will be free of significant *defects* and will perform in the way goods of that kind should perform." *Van Wyk v. Norden Labs., Inc.*, 345 N.W.2d 81, 84 (Iowa 1984) (emphasis added). More recently, this court has held that proof of a "serious product defect" was sufficient to support submission of strict liability and breach of warranty theories. *Ballard v. Amana Soc'y, Inc.*, 526 N.W.2d 558, 562 (Iowa 1995). Notwithstanding a shared focus on defects, warranty claims have been distinguished from strict liability claims on the ground that "'defects of suitability and quality are redressed through contract actions and safety hazards through tort actions.'" *Am. Fire & Cas. Co. v. Ford Motor Co.*, 588 N.W.2d 437, 439 (Iowa 1999) (citations omitted); *cf. Shell*, 489 So. 2d at 571 ("The implied warranty mandated by this section of the U.C.C. is one of *commercial* fitness and suitability . . . . That is to say, the U.C.C. does not impose upon the seller the broader obligation to warrant against health hazards inherent in the use of the product when the warranty of commercial fitness has been complied with. Those injured [**59] by the use of or contact with such a product, under these circumstances, must find their remedy outside the warranty remedies afforded by the U.C.C."). Despite this distinction, we have found no error in submitting personal injury claims under both strict liability and breach of warranty theories. *See Mercer*, 616 N.W.2d at 621. In contrast, where only economic loss is alleged, recovery is limited to warranty claims. *E.g.*, *Tomka v. Hoechst Celanese Corp.*, 528 N.W.2d 103, 107 (Iowa 1995) (affirming dismissal of negligence and strict liability claims in case alleging purely economic injuries).

Although this court has approved submission of both theories in personal injury cases, we have noted the same evidence sufficient to support a negligence claim based on product defects is likewise adequate to support a breach-of-implied-warranty claim. *Mercer*, 616 N.W.2d at 621. Similarly, this court has stated that while strict liability, negligence, and breach of warranty are "distinct theories of recovery, the same facts often give rise to all three claims." *Lovick*, 588 N.W.2d at 698.

As this review of our case law [**60] reveals, we have distinguished product claims premised on tort theories from product claims grounded on warranty theories on the basis of the damages sought rather than on the basis of the nature of the wrongful conduct. And, although we have limited cases involving only economic loss to warranty theories, personal injury plaintiffs are permitted to seek recovery under tort and warranty theories that in essence allege the same wrongful acts. We conclude, therefore, that under Iowa law a seller's warranty that goods are fit for the ordinary purposes for which such goods are used gives rise to the same obligation owed by manufacturers under tort law with respect to the avoidance of personal injury to others.

The Products Restatement is consistent with this position. It suggests that cases involving harm to persons should satisfy the definition of product defect under section 2, whether the claim is brought under a theory of implied warranty of merchantability or under a tort theory. Products Restatement § 2 cmt. *n*, at 35; *accord Vassallo v. Baxter Healthcare Corp.*, 428 Mass. 1, 696 N.E.2d 909, 923 (Mass. 1998) (adopting Products Restatement test for failure-to-warn [**61] claim based on breach of implied warranty of merchantability); *cf.* 1 James J. White and Robert S. Summers, *Uniform Commercial Code* § 9.8, at 521 (4th ed. 1995) (stating authors' belief that merchantability standard and tort standard for "defective condition" under [*182] section 402A "are interchangeable"). We think this suggestion reflects current Iowa law: conduct that gives rise to a warranty claim based on fitness for ordinary purposes mirrors conduct that gives rise to tort liability for a

defective product. Thus, warranty liability under section 554.2314(2)(*c*) requires proof of a product defect as defined in Products Restatement section 2.

Having defined the nature of the conduct that violates a warranty of merchantability, we now turn to the question before us: can a cigarette manufacturer be liable for breach of the implied warranty of merchantability when the cigarettes smoked by the plaintiff were in the condition intended by the manufacturer and the plaintiff alleges the defendants' cigarettes are "substantially interchangeable"? If the defect alleged by the plaintiff is a manufacturing defect, *see* Products Restatement § 2(a), then the answer is "no" for the [**62] same reasons that we have previously held that a plaintiff may not recover from a cigarette manufacturer under a manufacturing defect theory when the cigarettes smoked by the plaintiff were in the condition intended by the manufacturer. Obviously, the fact that the cigarettes were in the condition intended by the manufacturer would not preclude recovery under an implied warranty theory where the defect alleged arises from a defective design or inadequate instructions or warnings. *See* Products Restatement § 2(b), (c).

X. *Summary*.

Our answers to the certified questions can be summarized as follows:

1. In a design defect products liability case, what test applies under Iowa law to determine whether cigarettes are unreasonably dangerous? What requirements must be met under the applicable test?

Answer: The test and requirements of Restatement (Third) of Torts: Product Liability sections 1-2 (1998) apply.

2. Under Iowa law, can the defendants rely on comment *i* of section 402A of the Restatement (Second) of Torts to show that cigarettes are not unreasonably dangerous?

Answer: Because Iowa has abandoned section 402A and the requirement of unreasonably dangerous, the defendants [**63] cannot rely on the statement made in comment *i* pertaining to tobacco.

3. Under Iowa law, does the common knowledge of the health risks associated with smoking, including addiction, preclude tort and warranty liability of cigarette manufacturers to smokers because cigarettes are not unreasonably dangerous insofar as the risks are commonly known?

If yes, then:

a. During what period of time would such knowledge be common?

b. Is there a duty to warn of the risks associated with smoking cigarettes in light of such common knowledge?

c. Is reliance on advertisements, statements or representations suggesting that there are no risks associated with smoking, including addiction, justifiable in light of such common knowledge?

Answer: Generally speaking, consumer knowledge is merely one factor in assessing liability for design defects or for failure to warn of product risks. The remainder of this question calls for factual determinations that are beyond the scope of a certified-question proceeding. In the absence of a factual finding with respect to the common knowledge of consumers during the relevant time frame, we cannot determine whether [*183] such knowledge would, as a matter of law, [**64] preclude liability under the principles set forth in the Products Restatement.

4. Under Iowa law, can a plaintiff bring a civil conspiracy claim arising out of alleged wrongful conduct that may or may not have been an intentional tort--i.e., strict liability for manufacturing a defective product or intentionally agreeing to produce an unreasonably dangerous product?

Answer: Yes, a plaintiff may base a civil conspiracy claim on wrongful conduct that does not constitute an intentional tort.

5. Under Iowa law, can a manufacturer's alleged failure to warn or to disclose material information give rise to a fraud claim when the relationship between a plaintiff and a defendant is solely that of a customer/buyer and manufacturer?

Answer: Yes, but only when disclosure is required (1) to correct misleading statements of fact made by the manufacturer with the intent to influence consumers, or (2) to correct statements of fact made by the manufacturer to influence consumers that were true when made but become untrue or misleading in light of subsequently acquired information.

6. Does an "undertaking" arise under section 323 of the Restatement (Second) of Torts, as adopted in Iowa, by reason [**65] of a product manufacturer's advertisements or statements directed to its customers?

Answer: Not within the factual parameters presented by this case.

7. Does Iowa law allow a plaintiff to recover from a cigarette manufacturer under a manufacturing defect theory when the cigarettes smoked by the plaintiff were in the condition intended by the manufacturer?

Answer: No.

8. Does Iowa law allow a plaintiff to recover from a cigarette manufacturer for breach of implied warranty of merchantability when the cigarettes smoked by the plaintiff were in the condition intended by the manufacturer and the plaintiff alleges the defendants' cigarettes are "substantially interchangeable"?

Answer: If the breach is based on a manufacturing defect, recovery is not allowed. If the breach is based on a defective design or inadequate instructions or warnings, recovery is not precluded under the stated facts.

CERTIFIED QUESTIONS ANSWERED.

LEXSEE

JOSEPH M. WRIGHT, Plaintiff, v. CHARLES DUNN, et al, Defendants.

CASE NUMBER: 06-12289

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2007 U.S. Dist. LEXIS 48874

July 6, 2007, Decided
July 6, 2007, Filed

SUBSEQUENT HISTORY: Motion denied by, Dismissed by Wright v. Dunn, 2007 U.S. Dist. LEXIS 57300 (E.D. Mich., Aug. 7, 2007)
Affirmed by Wright v. Dunn, 2009 U.S. App. LEXIS 4239 (6th Cir.) (6th Cir. Mich., 2009)

PRIOR HISTORY: Wright v. Dunn, 2007 U.S. Dist. LEXIS 20234 (E.D. Mich., Mar. 22, 2007)

COUNSEL: [*1] For Joseph M. Wright, Plaintiff: Francois M. Nabwangu, LEAD ATTORNEY, Nabwangu and Nabwangu, Belleville, MI; Joseph M. Wright, LEAD ATTORNEY, Joseph M. Wright Assoc., Kissimmee, FL.

For Charles Dunn, Defendant: Costanzo Z. Lijoi, LEAD ATTORNEY, Bellanca, Beattie, Harper Woods, MI; Robert M. Wyngaarden, LEAD ATTORNEY, Johnson and Wyngaarden, Okemos, MI.

For C. James Holley, Little Rock Baptist Christian Care, Incorporated, Defendants: Caleb M. Simon, LEAD ATTORNEY, Caleb M. Simon Assoc, Birmingham, MI; Robert M. Wyngaarden, Johnson and Wyngaarden, Okemos, MI.

For Bettie Cotton, Sandra Bowman, Metro Management Team, Incorporated, Defendants: Costanzo Z. Lijoi, LEAD ATTORNEY, Bellanca, Beattie, Harper Woods, MI; Robert M. Wyngaarden, Johnson and Wyngaarden, Okemos, MI.

For Michael Langnas, Defendant: Kathleen H. Klaus, LEAD ATTORNEY, Maddin, Hauser, Southfield, MI.

For Comerica Bank, Defendant: Dean J. Groulx, Simon, Galasso, Troy, MI.

For Huntington Bank, Defendant: Dean J. Groulx, LEAD ATTORNEY, Simon, Galasso, Troy, MI.

JUDGES: HONORABLE VICTORIA A. ROBERTS, United States District Judge.

OPINION BY: Victoria A. Roberts

OPINION

ORDER

I. INTRODUCTION

This matter is before the Court on Defendants' Motion to Dismiss Pursuant [*2] to FED. R. CIV. P. 9(b) and 12(b)(6) filed on March 27, 2007 (Doc. # 33) and Plaintiff's Response to Defendant's Motion to Dismiss and Motion to Amend Complaint Pursuant to FED. R. CIV. P. 15(a) filed on April 6, 2007 (Doc # 37). For the following reasons, the Court **GRANTS** in part and **DENIES** in part Defendants' Motions. Plaintiff's Motion to Amend is **GRANTED** in part.

II. BACKGROUND

Plaintiff filed a complaint against several Defendants alleging: (1) Racketeering ("RICO"), based on 18 U.S.C. §§ 1961 and 1962; (2) Racketeering and Conspiracy, based on 18 U.S.C. § 1962(c); (3) Slander, Libel, and Conspiracy; (4) Malfeasance, Nonfeasance, Breach of Fiduciary Duties and Fraud; and (5) Breach of Contract and Breach of Implied Contractual Duty of Loyalty, Good Faith and Fair Dealing. Pursuant to motions to dismiss, the Court found that Plaintiff failed to state a claim against Defendants Rev. C. James Holley ("Holley'), Michael Lagnas, and Little Rock Baptist Christian Care, Inc. ("LRC") and dismissed those defendants. Plaintiff also filed suit against Charles Dunn

("Dunn"), Sandra Bowman ("Bowman"), Metro Management Inc. ("Metro"), and Bettie Cotton ("Cotton," collectively "Defendants") and [*3] those claims remained. On March 27, 2007, these remaining Defendants filed a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6) and 9(b). In response, Plaintiff filed a motion to amend his complaint to: (1) reinstate Holley as a defendant; (2) include three new defendants; and (3) plead fraud with sufficient particularity. Plaintiff also purported to respond to Defendants' motion to dismiss; however, he did not address any of the arguments raised in Defendants' motion. At the request of the Court, Plaintiff filed a supplemental response to Defendants' motion. [1]

1 Defendants requested the Court to sanction Plaintiff under FED. R. CIV. P. 11 for filing the supplemental response. Because the Court requested the supplemental pleading, no sanctions will be imposed.

This case arises out of actions that occurred during the operation of LRC, a nursing home. Defendant Dunn owned a nursing home, Ambassador Nursing Home, d/b/a Pembrook Nursing Home ("Pembrook). On April 16, 2004, Defendant Dunn sold Pembrook to LRC, and the land on which the nursing home was sited, to a nonprofit, Little Rock Baptist Nursing Centers ("LRNC"). Metro contracted to provide administrative services. Plaintiff was [*4] the chief operating officer ("COO") of LRC. Plaintiff claims he received a 30% ownership interest in LRC for carrying out his duties as COO. Defendant Holley, the minister of LRC, owned 35%. The remaining ownership interest was divided among others.

Plaintiff contends that LRC was profitable under his management. Meanwhile, Dunn orchestrated a criminal enterprise to undermine LRC's success. Plaintiff alleges that Dunn did this by triggering defaults in LRC's land contract and stock purchase agreements so that he could reclaim the business and the property.

On October 26, 2005, Dunn allegedly removed Plaintiff from LRC's payroll. In protest, Plaintiff resigned from all positions at LRC. Plaintiff alleges that a part of Dunn's "scheme" included taking steps to change the signatory on various banks accounts of LRC so that Plaintiff would no longer have access. In addition, Dunn allegedly submitted fraudulent mortgage applications on behalf of LRC, thereby precluding LRC from borrowing funds to pay off its land contract. While Plaintiff's complaint primarily raises accusations against Dunn, Plaintiff alleges that the other Defendants participated in this "scheme." He seeks to include Pembrook, [*5] LRNC, and LRC's Board of Directors as co-conspirators. Plaintiff's amended complaint, however, states no allegations against Pembrook or LRNC.

III. STANDARD OF REVIEW

Rule 12(b)(6) permits dismissal of a lawsuit for failure to state a claim upon which relief could be granted. *See* FED. R. CIV. P. 12(b)(6). The Rule requires the Court to "construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle [Plaintiff to] relief." *Harbin-Bey v. Rutter*, 420 F.3d 571, 575 (6th Cir. 2005). The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). However, "to avoid dismissal under Rule 12(b)(6), a complaint must contain either direct or inferential allegations with respect to all the material elements of the claim." *Wittstock v. Mark a Van Sile, Inc.*, 330 F.3d 899, 902 (6th Cir. 2003).

Rule 9(b) provides that "[i]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." [*6] FED. R. CIV. P. 9(b). The Rule serves to put defendants on notice of the conduct complained of by the plaintiff to ensure that they are provided sufficient information to formulate a defense. *Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 679 (6th Cir. 1988). The Sixth Circuit interprets the particularity requirement "liberally, . . . requiring a plaintiff, at a minimum, to allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud. *Coffey v. Foamex L.P.*, 2 F.3d 157, 162 (6th Cir. 1993)(internal citations and quotations omitted); *Blount Fin. Serv., Inc. v. Walter E. Heller and Co.*, 819 F.2d 151, 152 (6th Cir. 1987)("Fraud alleged in a RICO civil complaint for mail fraud must state with particularity the false statement of fact made by the defendant which the plaintiff relied on and the facts showing the plaintiff's reliance on defendant's false statement of fact."); *see also Evans v. Pearson Enters.*, 434 F.3d 839, 852-853 (6th Cir. 2006) (affirming dismissal of fraud action where plaintiff failed to plead reliance with particularity [*7] as required by Rule 9(b)).

In ruling upon a motion to dismiss under Rule 9(b) for failure to plead fraud with particularity, a court must factor in Rule 8. Rule 8 requires a "short and plain statement of the claim," and calls for "simple, concise, and direct" allegations. Fed. R. Civ. P. 8. The Sixth Circuit stated that "Rule 9(b)'s particularity requirement does not mute the general principles set out in Rule 8;

rather, the two must be read in harmony." *Michaels Bldg. Co. v. Ameritrust Co.*, 848 F.2d 674 (6th Cir. 1988).

Therefore, "courts should not be 'too exacting' or 'demand clairvoyance from pleaders' in determining whether the requirements of Rule 9(b) have been met." *Id.* at 681. Instead, if the defendant has fair notice of the charges against him, Rule 9(b) is satisfied. *Id.* at 680. A district court, however, need not accept claims that consist of no more than mere assertions and unsupported or unsupportable conclusions. *See Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 2006 WL 1302479, *2 (6th Cir. 2006).

IV. APPLICABLE LAW AND ANALYSIS

A. MOTION TO AMEND COMPLAINT

The Court dismissed several defendants. Plaintiff now seeks to amend his complaint to add parties [*8] and claims, and to reinstate claims against Holley and LRC.

Federal Rule of Civil Procedure 15(a) provides that a party may file an amended complaint "only by leave of court or by written consent of the adverse party." FED. R. CIV. P. 15(a). The Federal Rules embrace "a liberal policy of permitting amendments." *Inge v. Rock Fin. Corp.*, 388 F.3d 930, 937 (6th Cir. 2004)(citing *Ellison v. Ford Motor Co.*, 847 F.2d 297, 300 (6th Cir. 1988)). Rule 15(a) provides that such "leave shall be freely given when justice so requires." *Id.* However, a motion to amend a complaint will be denied if the amendment was unduly delayed, made in bad faith or with dilatory motive, would cause undue prejudice to the opposing party, or would be futile. *See* FED. R. CIV. P. 15(a); *Foman v. Davis*, 371 U.S. 178, 183, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962); *Leary v. Daeschner*, 349 F.3d 888, 905 (6th Cir. 2003). The controlling factor is "futility" and the Court "may deny a motion for leave to amend a complaint if such complaint, as amended, could not withstand a motion to dismiss." *Warren v. Mfr. Nat'l Bank of Detroit*, 759 F.2d 542, 546 (6th Cir. 1985)(citing *Neighborhood Dev. Corp. v. Advisory Council on Historic Preservation*, 632 F.2d 21, 23 (6th Cir. 1980)).

Plaintiff's [*9] motion includes virtually no argument supporting leave under Rule 15(a). Plaintiff does not address the issues of delay, prejudice to opposing party, or futility. Instead, he merely states that leave should be freely given because of the nature of his claims, and under FED. R. CIV. P. 54(b), this Court may amend its previous Order.

The Court reviewed Plaintiff's First Amended Complaint. Plaintiff proposes to add three new defendants: LRNC, the LRC Board of Directors, and Pembrook, and three new claims: tortious interference; breach of fiduciary duties; and shareholder oppression. The new claims directed at the new parties and Dunn allege that Defendants conspired to tortiously interfere with Plaintiff's business relationship and oppress him as a minority shareholder. Plaintiff also attempts to better describe his fraud and RICO claims. However, much like Plaintiff's first complaint, these allegations are not stated with particularity and only generally allege that Defendants defrauded and oppressed Plaintiff through an unlawful scheme.

Moreover, as discussed more fully below, most of Plaintiff's allegations are simply insufficient to state a claim. To allow Plaintiff to amend his complaint [*10] would be futile. Further, because the Court dismissed both Holley and LRC, Plaintiff cannot reinstate them as defendants under Rule 15. Plaintiff also cannot include the LRC board of directors as a defendant; the board is not a legal entity and Plaintiff does not purport to sue the directors in their individual capacities.

For these reasons, the Court finds that Holley, LRC, the LRC Board, LRNC, and Pembrook are not proper parties to this suit.

Plaintiff did include one viable claim-tortious interference. The Court will allow him to amend his complaint to include this claim.

B. Motion to Dismiss

1. RICO CLAIMS (Counts I and II)

Plaintiff's RICO claims are primarily directed against LRC. Plaintiff claims that certain Defendants allegedly engaged in a pattern of racketeering activity, in violation of 18 U.S.C. §§ 1961(1)(A), (4), (5); 1962(c); 1341 and 1343: by overpaying for services, conspiring to undermine the profitability of LRC [2], and, conspiring to exclude Plaintiff from working for, or holding stock ownership in, LRC.

> 2 Plaintiff claims Dunn and the other Defendants undermined LRC's profitability by: (1) presenting false financial statements with mortgage loan applications; (2) failing [*11] to prioritize current accounts payable over accounts payable liabilities previously incurred by Dunn; (3) violating vendor contracts and incurring new more expensive vendor liabilities; (4) increasing labor expenses without justification; (5) Dunn continuing to charge for "consulting" fees through Metro; (6) mismanaging and settling lawsuits without proper authority in a manner adverse to the interests of LRC; (7) directing LRC not to accept patients and to direct any new patients to a nursing home in which Dunn owned an interest; and (8) refusing to pay LRC's debts.

To establish a RICO violation, Plaintiff must show that the Defendants engaged in "(1) conduct, (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985). "In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the [predicate acts] constituting violation." *Id.*

Plaintiff lack standing to bring a RICO claim for wrongs that injured LRC. *Frank v. D'Ambrosi*, 4 F.3d 1378, 1385 (6th Cir. 1993); *see also Warren v. Mfr. Nat'l Bank of Detroit*, 759 F.2d 542, 544 (6th Cir. 1985). [*12] In *Frank*, the Sixth Circuit held that actions for injuries against corporations may only be brought in the name of the corporation and not by shareholders in a direct suit. *Id*. It follows that Plaintiff's RICO claim cannot be based on the "undermined profitability" of LRC.

Rather, Plaintiff must show that Defendants injured *his* property or business by "at least two acts of racketeering activity, one of which occurred after the effective date of [RICO] and the last of which occurred within ten years . . . after commission of a prior act of racketeering activity." 18 U.S.C. § 1962 (c), § 1961(5). Plaintiff must also show that "the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989). Plaintiff fails to establish the elements of his RICO claim because: (1) he does not demonstrate a predicate criminal RICO violation; and (2) he does not allege injury to his business or property.

Plaintiff claims a pattern of racketeering predicated on mail and wire fraud, but he does not articulate the specifics of his claim. For example, Plaintiff asserts that Defendants committed mail [*13] and wire fraud by "multiple acts of racketeering activity" and that "each act was related in purpose, or scheme" to "defraud" and "victimiz[e] persons such as plaintiff." There are no other allegations.

Courts repeatedly hold in RICO cases alleging mail and wire fraud as the "predicate acts," that the underlying fraudulent activities must be pled with particularity. *Gotham Print, Inc. v. Am. Speedy Printing Centers, Inc.*, 863 F. Supp. 447, 457 (E.D.Mich. 1994). Federal Rule of Civil Procedure 9(b) further requires that in such RICO cases, specific allegations as "to *which* defendant caused *what* to be mailed (or made which telephone calls), and *when* and *how* each mailing (or telephone call) furthered the fraudulent scheme." *Id.* at 458. Where plaintiff's have fail to plead fraud within the requirements of 9(b), Courts dismiss the RICO claim. *Id.*; *Advocacy Organization for Patients & Providers v. Auto Club Ass'n*, 176 F.3d 315 (6th Cir. 1999). Plaintiff's conclusory allegations neither meet the requirements of 9(b) nor establish predicate acts upon which to base a RICO claim.

Moreover, the allegations set forth in the amended complaint fail to cure these deficiencies. In his amended complaint, [*14] which only alleges RICO claims against Dunn, Metro, Holley, and LRC's Board, Plaintiff still fails to address the time, place, subject matter, or individuals who -- through the use of mail or wire -- made fraudulent statements. Plaintiff does not identify mail fraud as the predicate criminal act. Nor does he specifically identify any statutory predicate acts committed by Dunn and Metro. He only states that Defendants generally engaged in "racketeering" and the Court's jurisdiction is based on 18 U.S.C. § 1961.

Only those acts identified in 18 U.S.C. § 1961(1) can constitute predicate offenses for RICO violations. Plaintiff's failure to cite a statutory section further demonstrates he has not established a RICO violation on the basis of Dunn's and Metro's alleged kickbacks, consulting fees, or conspiracy to exclude him.

Plaintiff alleges that Holley committed acts itemized in "19 (sic) U.S.C. 1961(1)(A) and (B) in violation of 18 U.S.C. 1962(d), including but not limited to: mortgage fraud; bank fraud; tax fraud (wire fraud); uniform fraudulent transfers against creditors; and securities fraud." However, Plaintiff's allegations (liberally read) demonstrate potential injury to LRC, not [*15] him. It is clear that Plaintiff, an attorney, and his counsel misunderstand the law. Absent predicate offenses and allegations to support such offenses, Plaintiff insufficiently alleges a foundation for RICO violations.

Further, his complaint is devoid of facts demonstrating an enterprise between Defendants. *See Vandenbroeck v. Commonpoint Mortgage Co.*, 210 F.3d 696, 699 (6th Cir. 2000)(stating "simply conspiring to commit a fraud is not enough to trigger [RICO] if the parties are not organized in a fashion that would enable them to function as a racketeering organization for other purposes."). To prove the existence of an enterprise, Plaintiff alleges that Defendants combined to form an association-in-fact. To meet the enterprise requirement, an association-in-fact must be an ongoing organization, its members must function as a continuing unit, and it must be separate from the pattern of racketeering activity in which it engages. *Id.*; *see Frank v. D'Ambrosi*, 4 F.3d 1378, 1386 (6th Cir. 1993). Plaintiff has not alleged any activity that would show an ongoing organization among Defendants.

Neither does Plaintiff sufficiently allege injury to his property or business. The only injury that [*16] may be

gleaned from Plaintiff's complaint is that he was forced to resign due to the "alleged" scheme, and lose his stock ownership interest. In his amended complaint, Plaintiff appears to argue (he does not explicitly state so in his racketeering counts) that the racketeering scheme caused him to relinquish his employment, monthly income of approximately $ 4,000.00, and stock ownership in LRC. However, Plaintiff fails to demonstrate sufficient injury in support of his RICO claims because none of Defendants alleged actions -- the alleged causes of Plaintiff's injury -- constitutes a predicate RICO offense.

Without predicate offenses and an enterprise, Plaintiff cannot prove either injury or a nexus between his alleged injury and the alleged actions of the enterprise. Therefore, the Court dismisses Plaintiff's RICO claims.

2. Slander, Libel, and Conspiracy (Count III)

In Count III, Plaintiff asserts a claim for slander and libel. Plaintiff argues that Dunn engaged in a conspiracy with Holley to slander Olivia Boykins, a minority shareholder.

It is well settled that Plaintiff cannot establish a claim for slander and libel for a statement that did not concern him. *Gonyea v. Motor Parts Fed. Credit Union*, 192 Mich. App. 74, 480 N.W.2d 297, 299 (Mich. App. 1991). [*17] Perhaps recognizing this, Plaintiff withdraws this claim from his amended complaint.

Accordingly, Count III, which named all Defendants, is **DISMISSED**.

3. Malfeasance, Nonfeasance, Fraud, and Breach of Fiduciary Duties (Count IV)

Count IV of Plaintiff's Complaint asserts a claim for malfeasance, nonfeasance, breach of fiduciary duties, and fraud. Plaintiff does not state allegations against Cotton or Bowman. Therefore, the Court grants their Motion to Dismiss this Count.

Most of Plaintiff's allegations reference Holley. [3] Only one paragraph specifically references Dunn and Metro. In paragraph 36, Plaintiff claims that "Defendants Dunn and Metro have engaged in a scheme to defraud the shareholders of Little Rock for their own personal benefit, and have taken unauthorized actions as Little Rock's 'consulting agents,' in an effort to undermine the financial viability of Little Rock."

3 The Court dismissed these claims against Holley in its March 22, 2007 Order.

Thus, Plaintiff's only claim is that Metro and Dunn engaged in fraud. This is supported by Plaintiff's omission of claims of malfeasance and nonfeasance from his amended complaint. In his amended complaint, Plaintiff alleges fraud against [*18] Dunn, Metro, Pembrook, LRC, and the LRC Board. Plaintiff also claims that these Defendants misrepresented corporate accounts and payments as legitimate expenditures and conducted a "straw sale" of the property.

Plaintiff fails to state a claim in both complaints. The premise of Plaintiff's fraud claim is that Dunn (along with others) entered into a fraudulent land contract and fraudulent business transactions with or on behalf of LRC, which resulted in Plaintiff being defrauded out of his employment and stock ownership.

To allege intentional fraud, a plaintiff must point to "misrepresentations or omissions which were 'reasonably calculated to deceive persons of ordinary prudence and comprehension.'" *Kenty v. Bank One, Columbus, N.A.*, 92 F.3d 384, 390 (1990)(citing *Blout Fin. Servs., Inc. v. Walter E. Heller & Co.*, 819 F.2d 151, 153 (6th Cir. 1987). Most important, Plaintiff "must allege with particularity a false statement of fact made by the defendant which the plaintiff relied on" and facts showing plaintiff's reliance upon the false statement of fact. *Id.*

Plaintiff does not specify any false statements made to him by Dunn or Metro upon which he relied. Therefore, he fails to meet his [*19] burden to plead fraud with particularity. In short, Plaintiff's vague and conclusory allegations are insufficient to state a valid fraud claim.

4. Breach of Contract, Breach of Implied Contractual Duty of Loyalty, Good Faith and Fair Dealing (Count V)

Plaintiff's allegations in Count V are equally insufficient to state a claim for breach of contract. Plaintiff alleges that Dunn, Bowman, and Metro breached their contractual obligations by conspiring to close LRNC's checking accounts. He also claims that Dunn breached his fiduciary duties to LRC and its shareholders by undermining the financial viability of LRC. Given that these are the only allegations in Count V of the original complaint, the Court is unable to determine the nature of Plaintiff's "breach of contract" claim. As noted by Defendants, Plaintiff's complaint is devoid of any facts stating the subject matter of the contract, the parties, or the terms.

To state a breach of contract claim under Michigan law, a plaintiff must set forth the elements of a valid contract -- (1) parties are competent to contract; (2) a proper subject matter; (3) legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation. *Brown v. Village Green Mgmt Co.*, 342 F.3d 620, 628 (6th Cir. 2003). [*20] Once a plaintiff alleges the

existence of a valid contract, then the Plaintiff must set forth facts demonstrating how the defendant breached the terms of the contract and caused the plaintiff injury. *Id.* Plaintiff does not plead any of these necessary elements. Without these basic allegations, the Court must dismiss this claim.

The Court must dismiss Plaintiff's breach of loyalty, good faith and fair dealing claims for the same reasons. His single sentence allegation concerning Dunn's breach of duties to LRC fails to set forth the material elements of the claim. Moreover, Plaintiff does not have a cause of action against Dunn for alleged wrongs to LRC which may have indirectly injured him. Therefore, the Court dismisses this claim.

5. Other Claims in Amended Complaint

a. Violations of the Michigan Business Corporation Act

In Counts II and III of his amended complaint, Plaintiff alleges violations of the Michigan Business Corporation Act ("MBCA"). When a shareholder alleges that a defendant breached his or her fiduciary duty by allowing diminution of corporate assets, the injured shareholder must file a shareholder derivative action. "The minimum requirements for such a suit are proof of [*21] fraud or abuse of trust in the board of directors of the corporation in failing or refusing to enforce a corporation right or claim, plus demand on said board by the stockholder for such action or proof that the demand would be useless." *Futernick v. Statler Builders, Inc.*, 365 Mich. 378, 387, 112 N.W.2d 458 (Mich. 1961). Plaintiff fails to allege any of these facts.

Yet, He argues that under MCBA sections 450.1489 and 450.1541(a), his rights as a minority shareholder were oppressed and Holley, LRC, the LRC Board, and Dunn breached their fiduciary duties by, *inter alia*, rescinding his stock without compensation and misappropriating corporate assets.

To state claims under the MBCA, Plaintiff must establish that the acts of those in control of the corporation are "illegal, fraudulent, or willfully unfair and oppressive." M.C.L.A. § 450.1489(1). To establish a breach of statutory fiduciary duty, Plaintiff must show that Defendants, as the controlling shareholders of LRC, failed to discharge their fiduciary duties to the minority shareholders in good faith, with the care of an ordinarily prudent person in similar circumstances and in a manner reasonably believed to be consistent with the best interests [*22] of the corporation. *See* M.C.L. § 450.1541(a)(1).

There are several differences between suits brought pursuant to § 450.1489 and § 450.1541(a). Most notably, suits under § 450.1489 seek to redress oppression that injures either the corporation or the shareholder; suits under § 450.1541(a) seek to redress wrongs to the corporation. Plaintiffs typically bring § 450.1541(a) suits as derivative actions under M.C.L. § 450.1492(a) on behalf of the corporation. In addition, the plaintiff in a § 450.1541(a) suit may be either a current or former shareholder. But a plaintiff in a § 450.1489 suit must be a current shareholder and may bring the suit in a direct or individual capacity.

The Michigan Court of Appeals held that a plaintiff cannot state a claim under M.C.L. § 450.1489 if he is not a current shareholder. *Irish v. Natural Gas Compression Sys.*, No. 266021, 2006 Mich. App. LEXIS 2229, 2006 WL 2000132 (Mich. App. 2006)(unpublished). In *Irish*, the plaintiff's shares were cancelled incident to a merger, and plaintiff ceased to be a shareholder. He was not a shareholder when he sued. The Court stated that "plaintiffs in a § [1]489 suit may only be current shareholders." *Id.* (citing *Estes v. Idea Engineering & Fabricating, Inc.*, 250 Mich. App. 270, 282, 649 N.W.2d 84 (2002)).

Since [*23] Plaintiff's stock was allegedly rescinded by Defendants prior to this lawsuit, he does not satisfy the standing requirement to bring an individual or direct shareholder suit under M.C.L. § 450.1489.

Further, Plaintiff has no standing to derivatively pursue a breach of fiduciary duty claim. A shareholder's authority and standing under the MBCA to raise claims by means of a derivative action are governed by M.C.L. § 450.1492(a), which provides:

> A shareholder may not commence or maintain a derivative proceeding unless the shareholder meets all of the following criteria:
>
> (a) The shareholder was a shareholder of the corporation at the time of the act or omission complained of or became a shareholder through transfer by operation of law from one who was a shareholder at that time.
>
> (b) The shareholder fairly and adequately represents the interests of the corporation in enforcing the right of the corporation.

> (c) The shareholder continues to be a shareholder until the time of judgment, unless the failure to continue to be a shareholder is the result of corporate action in which the former shareholder did not acquiesce and the derivative proceeding was commenced *prior* to the termination of the former [*24] shareholder's status as a shareholder.

M.C.L. § 450.1492(a)(emphasis added).

As a former shareholder, Plaintiff has no standing to bring a derivative action under § 450.1492(a).

Although it appears his status as a former shareholder may have been the result of corporate action in which he did not acquiesce, Plaintiff did not begin this lawsuit prior to the termination of his status as a shareholder. For these reasons the Court finds allowing Plaintiff to amend his complaint to include claims under § 450.1489 and § 450.1541 would be futile.

b. Tortious Interference/Retaliation

Plaintiff's amended complaint includes a tortious interference/retaliation claim (Count V). Plaintiff's claim rests upon Defendants' alleged scheme to undermine the financial status of LRC and threaten Plaintiff. As a result of the scheme Plaintiff says he lost his job, stock, and salary as an officer of LRC. Plaintiff does not specifically identify which Defendants were "involved." The Court notes, however, that Plaintiff could only have a claim against Dunn because Holley, LRC, and the LRC Board are not proper parties.

A claim for tortious interference with business relations arises where the defendant, through improper [*25] conduct, causes a third party not to enter into or continue a business relationship. *Winiemko v. Valenti*, 203 Mich. App. 411, 416-17, 513 N.W.2d 181 (Mich.App. 1994). Under Michigan law, the elements of tortious interference are: (1) the existence of a valid business relationship (not necessarily evidenced by an enforceable contract) or expectancy; (2) knowledge of the relationship or expectancy on the part of the defendant interferer; (3) an intentional interference inducing or causing a breach or termination of the relationship expectancy; and (4) resulting damage to the party whose relationship or expectancy has been disrupted. *Wausau Underwriters Inc. Co. v. Vulcan Dev., Inc.*, 323 F.3d 396, 404 (6th Cir. 2003). Thus, an essential element is the defendant's intentional interference with the business relationship.

The first and second elements are met. Defendants were aware of Plaintiff's business relationship with LRC. However, the third element - intentional interference- requires a particularized inquiry. Michigan Courts require that a plaintiff show that the defendant committed a *per se* wrongful act or a lawful act with malice, unjustified in the law. *Wausau*, 323 F.3d at 404. A *per se* wrongful [*26] act is defined as "an act inherently wrongful or an act that can never be justified under any circumstances." A lawful act done with malice and without justification, must be proven by presenting specific affirmative action by the defendant that corroborates the improper motive of the interference. *BPS Clinical Laboratories v. Blue Cross & Blue Shield of Michigan*, 217 Mich.App. 687, 699, 552 N.W.2d 919 (Mich.App. 1996). Thus, the Court must determine whether, viewing the facts in a light most favorable to Plaintiff, Plaintiff stated a claim that Defendants committed acts that were wrongful *per se* or with malice.

Plaintiff does not specifically allege that Defendants acted with malice or that their actions were wrongful *per se*. Plaintiff also fails to allege that Defendants actions were unjustified under the law. He only states that Defendants' threats caused him to resign from his position at LRC. While threatening to sue or fire someone may not on its face rise to the level of " *per se*" wrongful, Plaintiff claims that Defendants did so in retaliation because he exposed their "scheme."

In the context of Rule 15(a) and a motion to dismiss, however, a claim should only be dismissed or deemed futile if [*27] "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). The Court is not persuaded that Plaintiff can prove no set of facts to support his tortious interference claim. Accordingly, the Court will allow Plaintiff to go forward on this claim.

V. CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss are **GRANTED** in part and **DENIED** in part. Plaintiff's Motion to Amend is **GRANTED** in part. The case will proceed on Plaintiff's tortious interference claim only, against Dunn. Plaintiff is required to filed an Amended Complaint that sets forth the specific allegations addressed above. The Amended Complaint is to be filed by July 20, 2007.

IT IS SO ORDERED.

S/ Victoria A. Roberts

United States District Judge

Dated: July 6, 2007